JOHN T. FEY, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 342

MINNIE FRANKLIN,
Petitioner,

VERSUS

J. D. SHELTON and Wife, VENERA SHELTON, suing herein in their own behalf; and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January, 1958

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In the
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MINNIE FRANKLIN,
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J. D. SHELTON and Wife, VENERA SHELTON, suing herein in their own behalf; and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Minnie Franklin, prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Tenth Circuit entered below on November 7, 1957.

THE OPINION BELOW

The opinion below is hereto attached as Appendix "A."

JURISDICTION

The decision and judgment of the Court of Appeals was entered on November 7, 1957. A timely Petition for Rehearing (R.) was denied by the court below on December 16, 1957 (R.). The mandate of the court below has been stayed until January 20, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

This case is of particular importance we think in view of the fact that it presents several questions which were such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. The facts are related as to the nature of the case in the opinion set forth and we deem it unnecessary to repeat them here.

QUESTIONS PRESENTED

1. There is direct conflict between the decisions of the Court of Appeals upon questions of Federal Rules of Civil Procedure, being Rules 51 and 46.

2. Conflict of decisions of Court of Appeals in opinion with state court decisions of the Supreme Court of Oklahoma on nonfederal questions in violation of the Rule and the law as announced by the Supreme Court of the United States in *Erie R. R.* v. *Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1183.

3. The judgment of the District Court for the Eastern District of Oklahoma and the opinion of the Circuit

Court of Appeals above quoted in this case denies to the petitioner her constitutional rights and is violative of Amendment V of the Constitution of the United States in that it denies her due process of law.

4. The trial court and the Court of Appeals denied the petitioner her constitutional rights guaranteeing her a fair and impartial trial on the ground of harmless error.

The facts as reflected by the record in this case are simply that the trial court refused, as we view it, to properly instruct the jury which we think is a fundamental error. The trial court refused to give to the jury proper requested instructions which were requested by the petitioner in writing and refused by the trial judge in writing. The trial judge refused to present to the jury the theory of defense of this petitioner. The trial judge by his instructions to the jury told the jury that the plaintiff, J. D. Shelton (in the trial court) had certain rights upon the highway with reference to assumption and refused to give the same instruction for the defendant (petitioner). The trial court refused to require plaintiffs' attorneys in the trial court (respondents here), to make a full opening argument after proper request and proper objections in the trial court taking an undue advantage of this petitioner and her counsel.

Also, this case presents the question to this Court of the conduct of the parties to litigation in the trial court in view of the fact that the principal plaintiff, J. D. Shelton, while on the witness stand, without cause or provocation, began weeping and crying loudly, we think for the purpose of exciting the jury and incurring their sympathy, and at the same time his wife, Venera Shelton, another plaintiff

in the trial court, stood up at the counsel table and began weeping and crying and thereby caused great confusion and sympathy of the jury, and the petitioner thereupon demanded and requested a mistrial which was refused by the trial court, and the Court of Appeals in its opinion held that this was in the discretion of the trial court, both as to the manner of arguing the case and as to the conduct of the parties in open court in the presence of the jury.

Petitioner therefore shows to this Court that this petition does present to this Court a very unusual trial, completely beyond the pale of accepted and usual course of judicial proceedings, and that she has been denied due process of law under the Constitution of the United States.

STATEMENT

A statement of the facts we deem unnecessary other than to say this case involves an accident between the petitioner and respondent J. D. Shelton, and the record shows very briefly, that the petitioner had driven her car south for the purpose of going to a business district on the east side of the road, had driven her car off the highway, headed or pointed to the east and there waited until all traffic had cleared, and when there was no traffic close enough to constitute an immediate hazard she drove her car to the business district on the east side of the highway and most of her car was off the paved portion of the highway when the respondent J. D. Shelton drove his car over the crest of the hill and into the side of the car of the petitioner bringing about injury to himself and to the petitioner and some other members of the family.

Question Presented Number One

There is direct conflict between the decisions of the Court of Appeals upon questions of Federal Rules of Civil Procedure, being Rules 51 and 46.

In presenting our first proposition that the Court of Appeals in its opinion committed grave error in refusing or in failing to consider Rule 46 of the Rules of Civil Procedure together with Rule 51, and that there is a conflict, in addition to the error, between the Court of Appeals' opinion in this case from the Tenth Circuit and the Court of Appeals of the Second Circuit, Eighth Circuit, Sixth Circuit and the Court of Appeals of the District of Columbia Circuit, we quote from the opinion of the Tenth Circuit in the case before the Court as follows:

> "Defendant filed twenty-four requests for instructions. The failure to give some of these instructions, especially those dealing with defendant's right to the use of the road as a reasonable and prudent person, is assigned as error. Nowhere in the record does it appear that defendant objected to the Court's failure to give its requested instructions. In the absence of such timely objection the question of the Court's refusal to give defendant's instructions will not be reviewed on appeal."

It will thus be noted that the Court of Appeals, Tenth Circuit held that it could not consider the requested instructions for the reason that no proper exception had been taken and cited Rule 51, Rules of Civil Procedure. We should here call to the Court's attention the fact that the requested instructions were in writing, submitted to the trial judge and by the trial judge in writing refused. We

think this is completely and fully sufficient and that the Court of Appeals, Tenth Circuit, erred in holding otherwise than above quoted. In support of the proposition that the requested instructions were properly presented and that the Circuit Court erred in so holding that they were not, and for the purpose of showing the conflict between the Tenth Circuit ruling in this case and the other circuits heretofore mentioned, we call the Court's attention to the following:

In the case of *Montgomery* v. *Virginia Stage Lines, Inc.*, the United States Court of Appeals, District of Columbia Circuit, 191 F.2d 770, in passing upon the construction of Rules 46 and 51, 28 U.S.C.A., said:

> "II. Appellee urges, however, that appellant failed to reserve the point for review as required by Rule 51 of the Fed.R.Civ.P., set forth in the margin. The circumstances pertinent to this contention are as follows:
>
> "(6, 8) A few moments prior to argument to the jury counsel for plaintiff stated, 'If Your Honor please, I have some special prayers which I would like to present.' The court responded, 'Submit your instructions in writing and I will pass upon them.' There ensued a brief discussion about the time likely to be consumed in argument. Then, as the transcript indicates, the arguments were made, followed by a short recess, whereupon the court instructed the jury. It does not appear when the requested instructions were submitted or acted upon, except that they bear the notations to which we have referred, dated the last day of the trial. If they were submitted after the charge was made, or if they had been previously submitted and were pending and unacted upon when the charge was completed, objection to their denial should be deemed

to have been made after the charge, reading Rule 51 with Rule 46. That these Rules should be considered together is held in *Wright* v. *Farm Journal*, 2 Cir., 1947, 158 F.2d 976 where a request for a 'further instruction' is considered equivalent to an objection for purposes of Rule 51. To like effect is *Williams* v. *Powers*, 6 Cir. 1943, 135 F.2d 153, 156, where it is said: 'Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient' * * *."

In the case of *Williams* v. *Powers*, 135 F.2d 153, Sixth Circuit, an automobile collision case, in which practically the same question arose as to whether or not proper exceptions were taken and the Court said in the body of the opinion in part as follows:

> "Appellee insists that appellant has waived the errors on which he now relies because of his alleged failure to comply with the rules of Civil Procedure, Rule 51, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c."

In commenting thereon the Court further stated:

> "Rule 46 of the Rules of Civil Procedure modifies the previous practice of formal exceptions to rulings or orders of the court and makes it sufficient for review that a party at the time the ruling or order of the court is made or sought, makes known to the court, the action which he desires the court to take or his objection to the action taken and his grounds therefor.

"(2, 3) Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient. *Sweeney* v. *United Features Syndicate*, 2 Cir. 129 F.2d 904; *Hall* v. *Aetna Life Insurance Company*, 8 Cir., 85 F.2d 447, 451. In our opinion we should consider the objection of appellant to the instruction given."

In the case of *Wright* v. *Farm Journal, Inc., et al.*, Circuit Court of Appeals, Second Circuit, 158 F.2d 976, the Court said in Syllabus 2, 3 and 4 as follows:

"2. Courts.

"A request for further instruction that anything stated which concerns and injures a person in his occupation or profession is libelous *per se* was equivalent to objection to charge which left to jury the question whether charge of communism was libelous. Federal Rules of Civil Procedure, rules 46, 51, 28 U.S.C.A., following section 723c.

"3. Courts.

"Federal Rule 51 requiring written request to be submitted at close of evidence must be construed in light of rule 46 modifying previous practice of formal exceptions to rulings or orders of court and making it sufficient for review that a party, at time ruling or order of the court is made or sought, makes known to court the action which he desires court to take or his objection to action taken and his grounds therefor. Federal Rules of Civil Procedure, Rules 46, 51, 28 U.S.C.A. following section 723c.

"4. Courts. Trial.

"An instruction leaving to jury question whether charge of communism was libelous was reversible error, irrespective of whether request for further instruction, which was equivalent to objection to instruction, was in writing."

In the body of the opinion the Court said:

"(2, 3) The request for a further instruction was in essence equivalent to an objection to the charge, which had left to the jury the question as formulated by the judge whether the words 'used in the article were or were not libelous.' Under Federal Rules of Civil Procedure, rule 46, 28 U.S.C.A. following section 723c: 'Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; * * *.' So far as Rule 51 requiring written requests to be submitted at the close of the evidence might have any pertinency to the case at bar it must be construed in the light of Rule 46. *Williams* v. *Powers*, 6 Cir., 135 F.2d 153, 156.

"(4, 5) The instruction in the charge that left to the jury the question whether the publication was libelous was erroneous. The instruction as given being erroneous, the failure to correct it will require a reversal, irrespective of whether the request was submitted in writing. No objection could be plainer than the request for an instruction diametrically opposed to the one given in the court's charge * * *."

Therefore, we feel that the Court of Appeals, Tenth Circuit, in this case placed upon the petitioner a burden

which is not authorized by the Rules of Civil Procedure and which constituted error in so holding, and that the opinion of the Tenth Circuit in this case if permitted to stand would leave litigants no method of presenting requested instructions and knowing whether their rights were protected. The reason for this statement simply is that when a litigant presents a written requested instruction and the court writes thereon the word, "refused", and signs his name, this must be as we view it sufficient although the Tenth Circuit by its opinion has held to the contrary as we construe the opinion. It is apparent from reading the opinion and observing the requested instructions that the Tenth Circuit Court failed to take into consideration Rule 46 in connection with Rule 51, Rules of Civil Procedure. Clearly, the holding of the Tenth Circuit in this case is contrary to the Rules of Civil Procedure and in conflict therewith and in conflict with the law and the other circuits cited above. A litigant cannot do any more than write the requested instructions, present them to the trial judge, and when he refuses the instructions in writing any further conduct or presentation on the part of counsel would be both obnoxious and improper.

Therefore, this petitioner was certainly denied her rights under the Rules of Civil Procedure and denied a substantial and fundamental right and the trial court committed fundamental error in denying the instructions, and the Court of Appeals in its opinion we think committed fundamental error in its holding above. As to fundamental error, we wish to call the Court's attention to the case of *Liberty Nat'l Bank of Weatherford* v. *Semkoff*, 84 P.2d 438, decided

by the Supreme Court of Oklahoma wherein that Court said:

> "Trial court has duty on its own motion to properly instruct jury on decisive issues made by pleadings and evidence introduced at the trial, and failure so to do constitutes 'fundamental error'."

In the body of the opinion the Court said:

> "* * * We have therefore examined the instructions given by the court merely for the purpose of determining whether or not they are free from fundamental error, and we find that they fail to instruct the jury upon the decisive issues made by the pleadings and the evidence introduced at the trial and are in this respect fundamentally erroneous. See *Guarantee Investment Corp.* v. *Killian*, 180 Okl. 74, 67 P.2d 939; *Williams* v. *Otis*, 155 Okl. 173, 8 P.2d 728; *Oklahoma Producing & Refining Corp. of America* v. *Freeman*, 88 Okl. 166, 212 P. 742. On account of the errors above pointed out the cause must be reversed and remanded for a new trial."

For the convenience of the Court we call attention to the instructions given by the trial court which are set forth as Appendix "B", and the instructions requested by the petitioner, defendant in the trial court, which are hereto attached as Appendix "C".

It will thus be seen that the holding of the Tenth Circuit fails to take into consideration the requested instructions above referred to and fails to construe Rule 46 in conjunction with Rule 51 and simply held as a matter of law in construing the said Rules of Civil Procedure that requesting instructions in writing and refusal in writing by

the judge does not protect a litigant. Surely this is a grave and fundamental error and has deprived this petitioner of a fundamental right. It in effect deprives her of a right to present requested instructions, and not only is fundamental error but is actually a denial of due process of law as the same will hereinafter be pointed out under the question of due process of law.

Therefore, we feel that for the reason above set forth the cause should be by this Court reversed.

Question Presented Number Two

Conflict of decisions of Court of Appeals in opinion with State Court decisions of the Supreme Court of Oklahoma on non-federal questions in violation of the rule and the law as announced by the Supreme Court of the United States in Erie R. R. v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188.

Under Proposition Number Two we wish to call to the Court's attention what we believe was not considered by either the trial court or the Court of Appeals, but we think that the Court of Appeals and the trial court in their opinions and judgments fail to take into consideration the decisions of the Supreme Court of the State of Oklahoma and the law of the State of Oklahoma in violation of the law as announced by the United States Supreme Court in *Erie R. R. v. Tompkins*. In this regard the trial court refused and declined to present to the jury in the instructions the theory of the defendant in the trial court, petitioner here, and by failing to give the requested instructions likewise refused to present her theory of the case which was

positively required by state law and the opinions of the Supreme Court of Oklahoma, and the trial court refused to define the statutory term "Assured Clear Distance Ahead." By presenting and giving the instructions as given by the trial court and refusing the instructions as requested by the petitioner herein, defendant in the trial court, both the trial court and the Court of Appeals proceeded in conflict with the law of Oklahoma and the decisions of the Supreme Court of Oklahoma.

Without dealing further with the statement concerning this proposition, we ask the Court to now keep in mind the requested instructions quoted, Appendix "C", and the instructions given by the trial court, Appendix "B." Without comment we call the Court's attention to the following cases with quotations from such cases by the Supreme Court of Oklahoma.

In the case of *Petty* v. *Frank et al.*, 194 Okla. 382, 151 P.2d 926, the Supreme Court of Oklahoma in the Syllabus by the Court used the following language:

> "2. In causes which require a jury trial, it is the duty of the trial court on its own motion to submit to the jury upon proper instructions the tenable theories of the litigants concerning the issues in the action, and a failure to discharge this duty is ground for a new trial, even though no instruction is requested by the parties. *Lacy* v. *Wrenecraft*, 188 Okl. 19, 105 P.2d 731."

In the body of the opinion the Court used this language:

> "• • • Defendants requested no instruction in this regard, but the rule in this jurisdiction is that it is the duty of the trial court, upon its own motion, to instruct upon the decisive features of the case, and fail-

ure so to do constitutes fundamental error. *Liberty Nat. Bank of Weatherford, Oklahoma*, v. *Semkoff*, 184 Okl. 18, 84 P.2d 438; *McIntire* v. *Burns*, 172 Okl. 152, 42 P.2d 143.

"In *Baumgart* v. *Bryant et al.*, 184 Okl. 531, 88 P.2d 635, 637, it is said: 'The rule concerning necessity of requests for instructions does not apply to instructions as to the law applicable to the issues raised by the pleadings and the evidence. Such has always been the rule in this state.'

"In *Lacy* v. *Wozencraft*, 188 Okl. 19, 105 P.2d 781, 782, it is held: 'In causes which require a jury trial, it is the duty of the trial court on its own motion to submit to the jury upon proper instructions the tenable theories of the litigants concerning the issues in the action, and a failure to discharge this duty is ground for a new trial even though no instruction is requested by the parties."

In the case of *Thompson et al.* v. *Galion Iron Works & Mfg. Co.*, 201 Okla. 182, 203 P.2d 438, the Supreme Court said in the body of the opinion:

"It thus appears that there is conflict in the evidence on at least two questions of alleged negligence on the part of the defendants, so the jury might well have failed to find negligence on the part of defendants and might well have found negligence on the part of Brazil as a sole cause of the damage to the grader.

"It is well settled that:

" 'In a case tried to a jury, where the evidence tends to support the same, it is the duty of the court to submit by appropriate instructions the theory of the defense; and failure so to do, at the request of defendant, constitutes prejudicial error.'—*Atchison, T. & S. F. Ry. Co.* v. *Jamison*, 46 Okl. 609, 149 Pac. 195.

"In *Oklahoma Ry. Co.* v. *Christenson*, 47 Okl. 132, 148 P. 94, it was held:

"The instructions of the court should be based upon the issues as made by the pleadings and the evidence, and should present the respective theories of the parties in accordance with the testimony offered in support thereof.

"*Men'en* v. *Richards et al.*, 54 Okl. 418, 153 P. 1177; *St. Louis-S. F. Ry. Co.* v. *Floyd, Adm'x*, 146 Okl. 42, 293 P. 250, 77 A.L.R. 1431; *Atchison, T. & S. F. Ry. Co.* v. *Ridley*, 119 Okl. 138, 249 P. 289; *Johnson* v. *Harris*, 166 Okl. 23, 25 P.2d 1072; *Dunlap & Taylor* v. *Flowers*, 21 Okl. 600, 96 P. 643; *Spurrier Lumber Co.* v. *Dodson*, 30 Okl. 412, 120 P. 934, 935. In the latter case it was held:

"'It is the duty of the court to submit to the jury, and give instructions thereon, any issue, theory, or defense which the evidence tends to support. This right is not affected by the fact that there is countervailing testimony.'

"Plaintiff asserts that there was no error in refusing the requested instructions and each of them for the reason that all the requested instructions required some correction or modification. This may be technically correct, but the requested instructions were sufficient to call the attention of the court to the theory of defendants there relied upon. The court recognized the existence of such a theory but declined to present it to the jury. It is the duty of the court to present the issues and theory of both parties where they are properly pleaded and are supported by the evidence, without a demand or request by either party. The fact that one party may couple with his request a statement of law which is not justified does not relieve the court of his duty in the premises.

"For failure of the court to properly present the theory of defendants which is supported by evidence, the judgment is reversed and the cause is remanded with instructions to grant defendants a new trial."

Without quoting from the cases but stating the holding of the Court in substance we wish to call the following authorities to the attention of the Court:

A litigant is entitled to have his defense or cause of action AFFIRMATIVELY SUBMITTED. *Smith* v. *Maher*, 84 Okla. 49, 202 Pac. 321, 23 A.L.R. 270 (Emphasis ours).

The court when duly requested must submit by instructions any material issue, theory, or defense which is supported by evidence. *Holmboe* v. *Neale*, 69 Okla. 183, 171 Pac. 334.

The right on request to have any material issue, theory, or defense submitted to the jury, if supported by evidence, is not affected by the fact that there is evidence to the contrary. *Holmboe* v. *Neale*, *supra*.

In case tried to a jury, court must submit plaintiff's theory where there is evidence reasonably tending to support it, and a failure to give requested instructions which are correct and applicable, either in language requested or substantially so, is reversible error. *Bristow* v. *Central State Bank*, 68 Okla. 195, 173 Pac. 221.

It will be noted from reading the instructions of the trial court that nowhere was the jury told under what conditions Mrs. Franklin could drive her car at the place in question. She alleged she had the right-of-way. In the instructions, so far as we can find, there is not even the word "right-of-way" used and it was clearly the duty of the trial

court to so instruct without requested instructions, but the Court will note that proper requested instructions were requested defining and telling to the jury under what conditions Mrs. Franklin, petitioner here, had the right to drive her car. We think that her theory was never presented to the jury, and we also wish to call to the Court's attention that in the instructions given by the trial court, the trial court said in effect that the plaintiff in the trial court, J. D. Shelton, had the right to assume that all persons using the highway would use the same in a reasonable, prudent and careful manner, and the defendant in the trial court, Mrs. Franklin, requested the same instruction and asked the court to tell the jury in effect that she had the right to assume that all persons using the highway would use the same in a reasonable, prudent and careful manner, but the trial court refused this instruction. We also wish to call to the Court's attention the fact that if the Court will read carefully the instructions given by the trial court, you will note that the trial court told the jury that if Mrs. Franklin crossed the concrete road or the highway when she could not do so with reasonable safety, she was guilty of negligence. In other words, the court made her the guarantor that she could cross in reasonable safety, while the true test is not whether she could cross in reasonable safety, but whether it appeared to her as a reasonably prudent person under the circumstances then existing that she could cross in safety. A requested instruction was requested setting this out, but the same was refused. There is no reason we know of why Mrs. Franklin was not entitled to have submitted to the jury a definition of the words which are

contained in the Statutes of Oklahoma, "Assured Clear Distance Ahead."

If this Court has not had occasion to review a case involving this phrase it would be difficult for this Court or anyone else to actually understand or know what is meant by this term. It is a legal term used in the Statutes of Oklahoma which requires a definition, especially in view of the fact that jurors probably had as many conceptions and ideas as to what is meant by the term "assured clear distance ahead" as there were jurors, which in this case there were twelve. In addition, so far as we can find, all courts where the question has been raised have required that legal terms be defined to the jury. We call to the Court's attention a few of the cases defining the term "Assured Clear Distance Ahead", and we state the substance of those holdings together with the citations.

To comply with "assured clear distance ahead" rule motorist must not drive at greater speed than will permit him to stop within distance between his vehicle and discernible object obstructing his line of travel. *Farris* v. *City of Columbus*, 85 Ohio App. 385, 85 N.E.2d 605, 607.

Under statute requiring that a motor vehicle be operated so that it can be stopped within distance between vehicle and point where view of highway is cut off or where a discernible object is found in lane of travel of motorist, the distance between motorist and point where his vision ends or is cut off by darkness, by a curve in highway or at the crest of a hill is the "assured clear distance ahead." *State* v. *Cheatwood*, 84 Ohio App. 125, 82 N.E.2d 770, 773.

The words, "assured clear distance ahead", in statute prohibiting operation of automobile at speed greater than will permit driver to stop within such distance, means distance from which discernible objects, reasonably expected or anticipated to be on highway, may be observed. *Snook v. Long*, 241 Iowa 665, 42 N.W.2d 76, 78, 21 A.L.R.2d 1.

"Assured clear distance ahead" is the distance between the motor vehicle of a motorist and any discernible object obstructing his path or line of travel. Gen. Code, Sec. 12603. *Marschal v. Frankman*, Ohio App., 58 N.E.2d 679, 683.

Operator must be able constantly to stop automobile within distance from which discernible objects may be seen ahead of it. *Blowers v. Waterloo, Cedar Falls & Northern Ry. Co.*, Iowa, 8 N.W.2d 751, 753; *Monon v. Jewel Tea Co.*, 227 Iowa 547, 288 N.W. 637, 639; *Anderson v. Kist*, 229 Iowa 462, 294 N.W. 726, 729.

Neither bends nor twists in the highway, crests in the road, dim lights, fog, sleet, rain or blinding lights of approaching motor vehicles excuse one from the duty to drive so that his vehicle may be stopped. *Termuhlen v. Campbell*, 70 Ohio App. 285, 48 N.E.2d 891, 893.

Crest of hill cutting off view of unlighted parked truck and being blinded by lights of oncoming automobile, no excuse. *Smiley v. Arrow Spring Bed Co.*, 138 Ohio St. 81, 33 N.E.2d 3, 5, 6, 7, 9, 133 A.L.R. 960.

The Third Circuit in the case of *Kocher v. Creston Transfer Co. et al.*, 166 F.2d 680, involving an automobile accident, held that the lack of essential definitions in in-

structions is reversible error. The opinion is in part as follows:

"(3) The appellant's argument, in any case, must fail for another reason. The 'assured clear distance ahead' rule is not merely a statutory obligation, but, apart therefrom, is an established principle of law of negligence in Pennsylvania. Thus, in *Hutchinson* v. *Follmen Trucking Co.*, 1939, 333 Pa. 424, at page 427, 5 A.2d 182, at page 183, it was said:

> 'No principle of the law of negligence has been more frequently emphasized in recent decisions than that establishing the duty of the operator of a motor vehicle to maintain such control over it as to enable him to bring it to a stop within the range of its headlights—a mandate fixed and unchangeable, however much the visibility be impaired • • • .'

"And in a footnote to that statement, the Court said:

> 'It is *also* imbedded in the statutory law: Act of May 1, 1929, P.L. 905, Sec. 1002, and amendments' (Emphasis supplied).

"In *Gaber* v. *Weinberg*, 1936, 324 Pa. 385, at page 387, 188 A. 187, at page 188, cited in the *Hutchinson* case, the Court said:

> 'The rule is inflexible BOTH BY STATUTORY REQUIREMENT AND BY THE DECISIONS OF THIS COURT, that the driver of a vehicle upon a highway must have it under such control as "will permit him to bring the vehicle to a stop within the assured clear distance ahead"' (Emphasis supplied).

"Indeed, it appears that the rule referred to was case law in Pennsylvania before the statute in controversy

was enacted. *Cf. Serfas* v. *Lehigh & N. E. R. Co.*, 1921, 270 Pa. 306, 113 A. 370, 14 A.L.R. 791."

Quoting further:

"* * * Assuming, nevertheless, the applicability of the charge, then particularly noteworthy is the lack of any definition of the enigmatic terms 'joint enterprise' and 'joint prosecution for a common purpose.' Lack of essential definition is reversible error."

In a very old case found in 233 Fed. 31, styled *Delaware & Hudson Co.* v. *Ketz*, the Court reversed the case because the trial court did not define the term "proximate cause", and we quote in part from that opinion as follows:

"In an action for the death of a railroad employe, who fell from a bridge, where the evidence was not clear that the negligence of the company in leaving one side of the bridge unguarded was the proximate cause of the accident, it was error for the trial judge to pass over the subject of proximate cause with only an allusion to the fact that the jury must determine whether the death was the proximate result of defendant's negligence, without defining 'proximate cause', though his attention was called to the subject by defendant's requests for instructions that the company was not liable, unless it had been guilty of negligence that was the proximate cause of the death."

The Court said in discussing this matter in the body of the opinion:

"* * * In our opinion, the charge was inadequate on this vital matter, and for this reason alone it would be necessary to reverse the judgment."

Without arguing the matter we would like to say that upon the vital matter of assured clear distance ahead the jury was never told what the term meant although requested to so do. The court merely said that persons were required to drive so as to be able to stop within the assured clear distance ahead. In the case last referred to the Court said:

> "* * * And, second, was his death the proximate result of the defendant's negligence."

See also: *Chicago, Rock Island & Pacific Railroad Company, a corporation* v. *Lint.*

In the case of *Merchants Motor Freight, Inc.* v. *Glen Downing and Independent Truckers, Inc.*, Court of Appeals, Eighth Circuit, 227 F.2d 247, the Court reversed the cause and remanded the same for new trial. This case likewise involves an automobile collision. Syllabi 10 and 11 are quoted as follows:

> "Under Iowa law, legal excuse need not be pleaded by a party in order for such party to be entitled to avail himself of the rule.
>
> "Under Iowa law, if there is evidence sufficient to support legal excuse, court has the duty to submit such issue to jury under proper instructions, particularly when request for such instruction has been made."

In the body of the opinion the Court said:

> "The instruction complained of may be correct as an abstract propositoin of law, but it cannot be said that stating such abstract proposition correctly without explaining its application would not result in misleading or confusing the jury in the face of the record in

this case which without question, shows that the decedent's automobile was on the wrong side of the road at the instant of collision * * *."

In *Johnson* v. *Erie P. R. Co.*, 236 F.2d 353, we quote from page 356 as follows:

"We need not consider how far separately each of the statements referred to would require reversal, since the cumulative effect of the several references is such as to MAKE THE POSSIBILITY OF CONFUSION too great to disregard. We think the plaintiff is entitled to a new trial. Reversed and remanded" (Emphasis ours).

Oklahoma cases construing the Assured Clear Distance Ahead law are many. We call the Court's attention to *Vanmen* v. *Kinsey*, 181 Okla. 92, 72 P.2d 497, and to *Whitney* v. *Douglas*, Okla., 307 P.2d 154, decided February 12, 1957, which last case involved an automobile driver striking a horse at night on a highway. The car was on the right side of the road coming over a crest of a hill. The Court applied the rule and held the driver of the car negligent because he did not have his car under such control as to be able to stop it within the assured clear distance ahead although he came over a hill in the nighttime and the mule was on his side of the road, so to speak. We think a mere abstract charge is not sufficient.

In the case of *Chicago & N. W. Ry. Co.* v. *Green*, 164 F.2d 55, Circuit Court of Appeals, Eighth Circuit, the Court said:

"As against a mere general or abstract charge, a party is entitled to specific instruction on his theory of defense if there is evidence to support it and if a proper request for such instruction is made."

Syllabus 7 is as follows:

> "A request for instruction, though not entirely perfect, may impose upon trial court duty to give a more specific instruction on particular issue, where it soundly appears that such instruction is needful to enable jury to intelligently determine the question."

We most respectfully ask this Court to read from the following authority:

Corpus Juris Secundum, page 816b, Theories, Article 301 and Article 302 on page 819 of the same Volume, and especially Article 303 on the same page setting forth the duty of the court to affirmatively submit the issue raised by the pleadings and the evidence.

Under the instructions as given by the trial court there was no way this jury could intelligently determine the questions involved. The word "Right-of-Way" was never used or defined. The words "Assured Clear Distance Ahead" were never defined, and we for emphasis' sake wish to again say to this Court that all of these matters were properly requested in the requested instructions and we think they were properly submitted to the trial court because the instructions were in writing and the trial court wrote thereon the word "Refused." The Court of Appeals we think declined to consider these requested instructions for the reason as noted in the opinion that apparently that Court felt they were not properly excepted to. Nevertheless, we think we have pointed out the authorities showing that the Court of Appeals was in error in so holding and that the instructions were properly presented to the trial court and should have been given and a failure to do so

failed to present to the jury the Oklahoma law, and that the opinion of the Court of Appeals in this case is contrary to the law of Oklahoma and the decisions of the Supreme Court as announced by the Supreme Court of Oklahoma and as set forth in the Statute.

Question Presented Number Three

The Judgment of the District Court for the Eastern District of Oklahoma and the Opinion of the Circuit Court of Appeals above quoted in this case denies to the petitioner her constitutional rights and is violative of Amendment V of the Constitution of the United States in that it denies her due process of law.

When we talk of the term "due process of law" under the Fifth Amendment we feel we should give to the Court some of the many definitions of that term by this Court, that is, the Supreme Court of the United States, and the many courts over the nation, and we will attempt briefly to call the Court's attention to why we think these fundamental errors did deny to this petitioner due process of law under the Fifth Amendment to the Constitution.

We are fully aware that the Fifth Amendment to the Constitution guarantees to every citizen of the United States due process of law, and the Fourteenth Amendment to the Constitution of the United States only requires the states to give to the citizens within its borders equal protection of the law, and that actually the Fourteenth Amendment has nothing to do with due process of law as applied in this case, and therefore, only the Fifth Amendment to the Constitution of the United States will be discussed in presenting this matter to this Court.

> "The term 'due process of law' is not susceptible of exact or comprehensive definition. Its meaning has been developed in the cases by a process of judicial inclusion and exclusion."

This quotation above given will be found in *Gilbert* v. *Elder*, 65 Idaho 383, 144 P.2d 194, 196. The Supreme Court of the United States used this language in substance, that "due process of law" has never been a term of fixed and invariable content. See: *Federal Communications Commission* v. *WJR, The Goodwill Station*, 69 Sup. Ct. 1097, 337 U.S. 265, 93 L. Ed. 1353. Also 12 C.J., p. 1188, note 54.

It appears that the Supreme Court of the United States has consistently refused to attempt a comprehensive definition of what is meant by due process of law. See *Douglas* v. *City of Jeannette*, C.C.A. Pa., 130 F.2d 652, which case was affirmed in 63 Sup. Ct. 877, 319 U.S. 157, 87 L. Ed. 1324. It has been said that, as is universally conceded, due process of law is not susceptible, or does not admit, of exact, precise, or comprehensive definition, its meaning necessarily varying with the dissimilarity in the proceedings in which it is required; that it is too broad a term to admit of a short definition which will cover every situation. Supporting this statement above, we call now to the Court's attention a few of the cases so holding. In a Wyoming case that Court in *Pirie* v. *Kamps*, 68 Wyo. 83, 229 P.2d 927, 929, 26 A.L.R.2d 647, used this language:

> "• • • the concept is indefinable by legalistic formula."

In the case of *People, on Complaint of McDonald* v. *Simonian*, 18 N.Y.S.2d 371, the New York Court said:

> "It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law'."

Also in the case of *In re Security Trust Co. of Rochester*, 70 N.Y.S.2d 260, and 92 N.Y.S.2d 308, 97 N.Y.S.2d 922, that Court said:

> "Any definition of 'due process of law' would probably fail to comprehend all the cases to which it would apply."

The Indiana Court in *Warren* v. *Indiana Telephone Co.*, 26 N.E.2d 399, 409, said:

> "The constitutional guaranty of due process is one of broad and comprehensive implications, not readily definable with precision."

12 C.J., p. 1188, note 55, says:

> "As applied to different classes of cases, courts, by process of inclusion or exclusion, apply the principles involved in the phrase."

The Court also said:

> "From the duty of the citizen to obey the laws of the state arises the corresponding right of the citizen to insist that the state comply with its own laws, and to demand, in the language of the constitution of the state that he be not deprived of his life, liberty, or his property unless by the judgment of his peers or the law of the land."

See the case of *U. S. ex rel Valotta* v. *Ashe*, D.C. Pa., 2 F.2d 735, 743, reversed on other grounds, 46 Sup. Ct. 333, 270 U.S. 424, 70 L. Ed. 662.

> "This provision of our organic law guarantees that every one shall have his life, liberty, property, and immunities protected by the general rules characteristic of, basic to and existing in our society under our system of jurisprudence."

See *State ex rel Sweezer* v. *Green*, 360 Mo. 1249, 232 S.W.2d 897, 903, 24 A.L.R.2d 340.

In *U. S. ex rel Montgomery* v. *Ragen*, D.C. Ill., 86 F. Supp. 382, this language is used:

> "Fair play is the essence of due process."

See *Galvan* v. *Press*, Cal., 74 Sup. Ct. 737, 742, 347 U.S. 522, 98 L. Ed. 911.

> "The concept of due process stems from our American ideal of fairness."

See *Bolling* v. *Sharpe*, App. D.C., 74 Sup. Ct. 693, 694, 347 U.S. 497, 98 L. Ed. 884.

JUDGE COOLEY defined due process and that definition is set forth in *Dulich* v. *Blair*, D.C. Wash., 3 F.2d 302. The Supreme Court of Oklahoma defined it in *Wilhite* v. *Cruce*, 70 Okla. 70, 172 Pac. 962. Another definition which is interesting is the one found in *U. S. ex rel Montgomery* v. *Ragen*, cited *supra*, where due process is defined as follows:

> "Due process of law is that process of impartial law which is binding because it is right. It senses the mistakes of the past and wants to rectify them. It provides men with faith."

As to whether the Fourteenth Amendment applies to both substantive and procedural rights, we call the Court's

attention to the fact that courts have gone beyond the literal meaning of "due procedure" and have brought within it substantive as well as procedural rights. See *Albritton* v. *City of Winona*, 178 So. 799, 58 Sup. Ct. 766, 303 U.S. 627, 82 L. Ed. 1088, and an Oklahoma case cited as *Skinner* v. *State ex rel Williamson*, 189 Okla. 235, 115 P.2d 123, reversed on other grounds 62 Sup. Ct. 1110, 316 U.S. 535, 86 L. Ed. 1655, conformed to 195 Okla. 106, 155 P.2d 715.

There are, of course, many more definitions, but actually they all when summarized and analyzed simply mean fair play.

In presenting the question as to whether or not the petitioner here was accorded a fair trial and whether or not she was denied due process of law, we call the Court's attention to these facts:

(a) The petitioner was entitled to have the case presented to the jury under proper instructions presenting her theory and defense herein. We think this definitely was not done.

(b) She was certainly entitled to have the jury instructed as to what was meant by the term "assured clear distance ahead" as this was the only way the jury could understand the law and she specifically pleaded the Oklahoma Statute, but this was refused.

(c) Since the court did instruct the jury that the plaintiff in the trial court, J. D. Shelton, had the right to assume that all persons would use the highway with reasonable and ordinary care, she was certainly entitled to have the court instruct the jury that she had the right to

assume the same thing and requested instruction was presented asking the court to so instruct the jury, but the court refused.

Therefore, the plaintiff in the trial court had the advantage of having the right to assume that other persons would use the highway in a reasonable and prudent manner, but the petitioner here did not have that right. It is fundamental that the rights of the parties are reciprocal and mutual, and we quote from the United States Court of Appeals in the case of *Oklahoma Natural Gas Co.* v. *McKee*, 121 F.2d 583, Tenth Circuit. In the body of the opinion on page 584 this language appears:

> "(1-5) Of course it is elemental that in law the duties incident to ordinary care which appellant and appellee owed to each other, are mutual and reciprocal. Likewise, each had a right to indulge in the presumption that the other would observe the rules of the road and otherwise exercise ordinary care * * *."

Next, we wish to call to the Court's attention what we think was unfair in the way this case was tried, and the record reflects that the following took place and which we think clearly reflects a denial of due process of law because we do not think the law was followed, and we say this with greatest respect to the trial court and the appellate court. When it came time to argue this case there were two lawyers representing the plaintiff in the trial court, respondents here, namely Mr. Mountcastle and Mr. Smith. There was one lawyer who would argue the matter on behalf of the defendant, namely John B. Ogden. The following occurred:

"Mr. Ogden: Your Honor, as I understand it, they are dividing the time equally and they must use half of their time first.

The Court: Well, I don't know of any rule about that.

Mr. Ogden: If the Court would require them to make a full and complete argument of everything so I can answer it is what I mean. The rule as I understand it is that they have to make a complete argument and I just answer that because it is something that after I quit talking I wouldn't be able to answer.

The Court: Well, Judge, the Court can't control that.

Mr. Ogden: If your Honor please, they were supposed to make the full argument on the opening so I could answer.

The Court: Well, no, I can't make them do that, you know. How much time do you want, Mr. Mountcastle?

Mr. Mountcastle: Five minutes.

(IN THE HEARING OF THE JURY)

(Whereupon Mr. Mountcastle proceeds with his argument • • •.)"

It should be apparent from the above excerpt of the transcript that defendant's counsel made a timely and proper objection and urged the court to enforce the rule applying to oral argument. Then at the close of Mr. Mountcastle's five-minute speech there followed another request, as shown by the following excerpt:

"Mr. Ogden: If your Honor please, I think they have to present their whole matter so I can answer. I am positive that the rule provides that

Mr. Smith: If the Court please, I object to counsel talking before the jury.

(THE FOLLOWING AT THE BENCH OUT OF THE HEARING OF THE JURY)

Mr. Ogden: Comes now the defendant and shows to the Court that Mr. Mountcastle stated that, to the jury, he would argue the question of liability or negligence and that Mr. Smith would argue the amount of damages and only used five minutes, leaving Mr. Smith 25 minutes, and the defendant now requests the Court to direct Mr. Smith to make such argument as he deems proper, or rather Mr. Mountcastle, on the question to be presented in the damage suit so that there will not be something that I cannot answer. I am requesting that the Court require that argument.

The Court: Well, overruled."

We think this procedure as outlined above absolutely prevented the petitioner herein from having a trial in accordance with the law and violated the due process clause. It certainly is not fair and we do not think it should be said that this was in the discretion of the trial court. If that is true, the trial court could have permitted the lawyer for the plaintiff to argue one minute and merely state his name and sit down or not argue at all and use all of his time in the closing argument. We wish to call to the Court's attention the following authorities with respect to the question of argument in the belief that this Court will hold that this was not fair play.

Corpus Juris, Volume 64, page 248, Article 267b, is in part as follows:

"PARTICULAR SCOPE OF OPENING AND CLOSING ARGUMENTS. It is the duty of counsel having the burden of the issues to present the whole case as he relies on it in his opening argument, and the opposing attorney may then discuss the propositions he has presented and present his own views of the case, after which, in conclusion, counsel having the burden should, in his reply, be confined to the points, grounds, and authorities exhibited, * * *."

The Court will note the citations are many under this statement in Corpus Juris.

We call to the Court's attention the following: *Atchison, T. & S. F. Ry. Co.* v. *Lambert*, 32 Okla. 665, 123 Pac. 428, wherein the Court said in part:

"* * * The right of argument is of the highest importance, and should be safeguarded in such a way as to protect both parties. He upon whom the burden rests has the right to open and close, but it is manifestly unjust to permit him to make a wholly incomplete and unfair presentation of the case, and reserve the whole force of the argument for a closing speech, as this practice does not give to the opposing party a fair chance to reply."

In *Rennie* v. *J. I. Case Threshing Mach. Co.*, 94 Okla. 26, 220 Pac. 626, the Court used this language:

"* * * We are unable to determine the extent of injury that might have been suffered by the defendant in the trial of the cause on account of his request to open and close the argument being refused, as a report of the argument of respective counsel is not before us. Otherwise error was not committed.

"Therefore we recommend that this cause be reversed and remanded for new trial."

In the case of *Fire Ass'n of Philadelphia* v. *Farmers' Gin Co.*, 39 Okla. 162, 134 Pac. 443, the Court used this language:

"The party bearing the burden of proof has the right to open and close the argument. His opening argument should be a complete and fair presentation of his theory of the case."

In the rather recent case of *Kinder* v. *Barnett Tank Line, Inc.*, 200 Okla. 370, 194 P.2d 864, the Court used the following language:

"* * * It seems to us that the weight of authority and sound reason support the following rule. In his opening argument the plaintiff should fully and fairly present his case to the jury.

* * * * * * * * * *

"It is certainly important to the administration of justice that no one be deprived of the full benefit of counsel. And it ought not to be allowed to counsel by any strategy or artifice to prevent a fair hearing. * * * Usually the plaintiff's opening must indicate what the defendants are expected to meet. They have a right to know what arguments are to be urged against them, and this they can only learn from the opening, inasmuch as they have no reply."

We do not think it fair to permit any trick or scheme to take away from a litigant the rights given to them under the law. Clearly, in this case this type of proceedings was wholly unfair to Mrs. Franklin. Her lawyer asked the court to require opposing counsel to make a full and complete

argument so that Mrs. Franklin's counsel could answer it. This was overruled and denied. All counsel could do is make the request. We think the court abused his discretion and he actually did not have the discretion to permit counsel to thus unjustly take advantage in the trial of this case, and by virtue thereof this cause should be by this Court reversed.

Under the Revised Rules of the United States Court of Appeals for the Tenth Circuit, Rule 20, with reference to oral arguments, page 14, paragraph 3, this Court says in such Rule:

> "PROVIDED ALWAYS, That a fair opening of the case shall be made by the party having the opening and closing arguments."

We wish to comment that this Court knows it is not fair when lawyers have 30 minutes to argue a case and state in court that the one opening will use only five minutes and the counsel who opened the argument stated to the jury that he would not argue but one question and that was the question of liability and that he would not argue the whole case the question of damages and so forth, and that his associate counsel would take up these other matters and take 25 minutes of the 30 minutes to make the closing argument. Certainly this is an unusual way to try a lawsuit and we think an unlawful way. This simply is not fair play or due process of law, and it is a matter of importance and the practice will grow unless stopped. We think the Supreme Court of the United States laid down a rule which would have and will have great weight in the administration of justice with reference to the argument and

conduct of lawyers and parties. The Supreme Court of the United States in the case of *New York Cent. R. Co. v. Johnson*, 279 U.S. 310, 49 Sup. Ct. 300, said in part as follows:

> "* * * The failure of the trial judge to sustain petitioner's objection, or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced. See *Hall v. United States*, 150 U.S. 76, 81, 37 L. ed. 1003, 1007, 14 Sup. Ct. Rep. 22; *Graves v. United States*, 150 U.S. 118, 121, 37 L. ed. 1021, 1023, 14 Sup. Ct. Rep. 40; *Wilson v. United States*, 149 U.S. 60, 68, 37 L. Ed. 650, 652, 13 Sup. Ct. Rep. 765. That the quoted remarks of respondents' counsel so plainly tended to excite prejudice as to be ground for reversal is, we think, not open to argument. The judgments must be reversed with instructions to grant a new trial.
>
> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. See *Union P. R. Co. v. Field*, 69 C. C. A. 536, 137 Fed. 14, 15; *Brown v. Swineford*, 44 Wis. 282, 293, 28 Am. Rep. 582. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. *Brasfield v. United*

States, 272 U. S. 448, 450, 71 L. ed. 345, 346, 47 Sup. Ct. Rep. 135."

There is no way to tell what would have been the result of this trial if this trial had been conducted in accordance with what we think is required by the laws of Oklahoma and the laws of the United States because we wish to specifically call to this Court's attention that the jury remained out deliberating more than four hours and returned and told the court that they could not agree on any of the claims or any of the defenses of any of the parties. In other words, they were a hung jury after four hours of deliberations. They were released for the night, came back at 10:00 o'clock, a.m., the next day and deliberated until noon, which was two hours, or shortly past noon, and finally returned a verdict against this petitioner for $82,000.00 or approximately that amount of money.

We think any one of the errors above could, should and did influence the jury and prevent a fair trial and that the verdict would have been the other way had she been accorded her rights as guaranteed to her by the Constitution of the United States.

There are many times when one error might be held or may be held to be harmless, but when there are many errors we think that a court should not apply the harmless error doctrine. As said in *Johnson* v. *Erie P. R. Co.*, 236 F.2d 353, and on page 356:

> "We need not consider how far separately each of the statements referred to would require reversal, since the cumulative effect of the several references is such as to MAKE THE POSSIBILITY OF CON-

FUSION too great to disregard. We think the plaintiff is entitled to a new trial. Reversed and remanded" (Emphasis ours).

In concluding we say we do not believe there could be serious doubt but what this case was not tried as ordinary cases are tried and it was not tried in accordance with the established law of Oklahoma in many respects, and one other unusual thing in this case, and we think it is very unusual, and ask the Court to consider it along with the error above, and that is the conduct of the parties themselves in the presence of the jury. While the plaintiff in the trial court, J. D. Shelton, was on the witness stand testifying, he burst forth into tears and began weeping and wailing, trembling and shaking while he was being questioned by his own lawyer, and there was no occasion whatever for it, and then his wife, another plaintiff Venera Shelton, sitting in the courtroom in the presence of the jury at the counsel table, jumped up and began crying and of course this excited the jury and counsel, and there were ladies on the jury and it is reasonable to assume that such an outburst must have excited sympathy and this is not fair play. The courtrooms should be guarded as we view it as a sacred place where justice is administered without giving either side an advantage by the parties weeping and wailing or advantage in the argument. There is no reason to do it. It creates a feeling in the minds of litigants that the courthouse is not a temple of justice but a place for advantage by any means so long as they can win. We say this with due respect to everyone concerned in the trial of this case, but nevertheless, there is no way to tell what effect all this has on a jury and we know it is not

the ordinary and usual course of proceedings and we know it is not right. We now call to your attention the following, showing what happened. Mr. Smith, the attorney for Mr. Shelton, was examining Mr. Shelton while Mr. Shelton was on the witness stand, and we quote in part as follows:

Q. "All right, sir. Now have you seen the pictures here that were introduced today in evidence of the station wagon?

A. Yes, sir.

Q. I just want to hand that to you and let you look at them and tell the jury then whether or not that represents the condition that you saw the station wagon immediately following the accident. You are first looking at Plaintiffs' Exhibit Number, let's see, Plaintiffs' Exhibit Number 4. Try to compose yourself, Mr. Shelton, and look at this Exhibit No. 4 now.

Mr. Ogden: If your Honor please, I would like to either approach the bench and make a record or have the jury excused.

The Court: Well, approach the bench.

(The following at the bench out of the hearing of the jury)

Mr. Ogden: Comes now the defendant and moves the Court for a mistrial in this case, for the reason that the conduct of both plaintiffs, Mr. and Mrs. Shelton, is such that it has brought about a condition that it would not be fair for us to try the case with this jury, Mr. Shelton sitting, with the witness crying loudly and wiping his tears from his face, right now in the presence of the jury, and Mrs. Shelton setting back here and crying and wiping tears from her face in the presence of the jury, and we know that the jury couldn't try the

case without being prejudiced, we think it would not be fair to the defendant to try the case under this circumstance.

The Court: Overruled.

Mr. Ogden: If the Court please, so I might have a record, there is no question but my statement is correct as to the facts?

The Court: No, of course I'm not passing on that. You have made your statement and of course the Court is not going to try to add to it or take anything from it."

We quote briefly from *Stutz* v. *Milligan et al.*, 223 S.W. 128. This case presents we think to the Court sound authority for supporting our position with reference to our motion for a mistrial. That Court said:

"Where in a wife's action for alienation of affections the husband was presented as a witness by defendants, the conduct of the wife in becoming hysterical and crying aloud at sight of him held to justify a discharge of the jury and the grant of a new trial."

The Court further said in this case:

"A new trial was granted in this case for the reason that the learned trial judge felt that the actions of plaintiff in the presence of the jury were such as to create, perhaps, an undue sympathy for plaintiff and a prejudice against respondents.

• • • • • • • •

"Courts cannot be too careful to see that juries are entirely free from improper influences, or even from a suspicion of such."

In the case of *Ullom* v. *Griffith*, 263 S.W. 876, the Court said:

"But we are of the opinion that a new trial should have been granted in this case, because of the court's failure to discharge the jury and declare a mistrial on account of what transpired, because the first juror questioned showed clearly his feeling for plaintiff and against defendant * * *.

"We think, in view of the whole record in this case, that the trial court erred in not discharging the jury and granting defendant a new trial. Therefore the Commissioner recommends that the judgment be reversed, and the cause remanded."

This case was reversed.

We most respectfully ask the Court, however, to read these cases because those statements alone would not give the Court a complete picture of the circumstances surrounding those trials and it is necessary that we make our quotations brief on account of the fullness of this brief.

In the case of *Tom Reed Gold Mines Co. v. Berd*, 260 Pac. 191, the Supreme Court of Arizona said:

"While we are impressed that the rule just stated is sound and should be generally followed, we cannot but feel that in the exercise of a sound discretion the court might well have discharged the jury and called another, free from the possible unmerited sympathy that might have been occasioned by the unfortunate conduct of plaintiff. No doubt, the impression made by plaintiff's conduct lingered with the jury throughout the case, and, honest men though they were, might have been a determining factor in their verdict * * *."

The Court further said in the body of the opinion:

"We conclude, not for one, but for the many errors that have crept into the record, the defendant is entitled to a new trial free from these errors."

The Court concludes with the following statement:

> "We think the record is so shot with error as to require a new trial. The order is that the judgment be reversed, and the cause remanded."

There is no question but what the above is the record and is what took place in the presence of the jury. A mistrial was requested and denied. Exhibit 4 was merely a picture of an automobile which should not cause a person to cry.

With reference to Question Three, we feel that this record is so shot with error, to use the language of the last authority, that it must require a reversal. We know of no reason why it is necessary in this country to permit cases to stand so full of error. A new trial will not hurt anyone if they are right in the first place, and we feel that the cause should be reversed for the reasons hereinabove set out under Question Number Three.

Question Presented Number Four

The trial court and the Court of Appeals denied the petitioner her constitutional rights guaranteeing her a fair and impartial trial on the ground of harmless error.

As to what is harmless error and what is not harmless error and what is judicial discretion and what is not judicial discretion, we shall attempt to outline what we think and some of the opinions thereon.

We feel that the opinion of the Court of Appeals misconstrues the harmless error doctrine and misconstrues as applied to the facts in this case the term "discretion of the

trial court." We will now attempt to point out the true test as to harmless error and discretion of the trial court.

We call to the Court's attention first the case of *Pacific Mut. Life Ins. Co. of California* v. *Tetirick*, 185 Okla. 37, 89 P.2d 774, 776, and we quote therefrom as follows:

> "We must conclude that this instruction is erroneous, and is not cured by any other instruction. We cannot say from the whole record that the issues were tried and determined in fairness and justice. We cannot say that no injustice was done defendant and we therefore find no basis whatever for application of the harmless error doctrine. However grave may be the condition of plaintiff, we cannot escape the conclusion that the trial court was led into reversible error in this instruction, so permitting the jury to improperly fix on defendant this severe liability. We are impressed with the thought that such verdict would not have been returned, but for the erroneous requirement of this instruction. We must reverse the judgment and remand the cause for a new trial, and it is so ordered."

The California Court in *Merchants' Ice & Cold Storage Co.* v. *Globe Brewing Co.*, 78 Cal. App.2d 618, 177 P.2d 963, 967, said in substance that a "harmless error" is an error which does not prejudice the substantial rights of the appellant or does not affect the result of the action.

In the case of *State* v. *Britton*, 27 Wash.2d 336, 178 P.2d 341, that Court defined "harmless error" in substance as follows:

> "A 'harmless error' is an error which is trivial, or formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and in no way affects the final outcome of the case."

The Federal Courts have passed many times on the question of harmless error under Rule 61, Federal Rules of Civil Procedure, and the Court of Appeals of the District of Columbia said through Judge Prettyman in the case of *Billeci* v. *United States* (C.A., D.C., 1950), 87 App. D.C. 274, 184 F.2d 394, 402, 403, 24 A.L.R.2d 881, in part as follows:

> "A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether * * *."

This case was reversed because of the comment and conduct of the judge in commenting.

In Moore's Federal Practice, Vol. 7, page 1021, we find that the substance of the author's statement is that in order to determine whether or not a ruling or admission of evidence is harmless or prejudicial must be solved by determining whether substantial rights of party have been violated, which in turn depends on the circumstances of each case. Many cases are cited supporting this rule. Consequently, it becomes more a matter before this Court after reading the record to determine whether any substantial rights have been violated.

We have heretofore pointed out we think instance after instance where they were violated. Therefore, the error could not be harmless. Certainly the proper instructions are the very fundamental ingredients of any trial. Certainly the definitions of legal terms should be given, and a failure to do so takes away a fundamental right. Certainly the argument of counsel should be conducted in accordance

with the law, and we have pointed out this was not followed and time after time, and yet many of these errors are referred to in the opinion as "harmless error", although the case was a serious case as to both parties and it took several days to try it and the jury deliberated more than six hours before being able to reach any kind of a verdict. Therefore, we say that if the case had been tried in the ordinary way we feel beyond a question of a doubt that this verdict would have been for the defendant or the petitioner here. There is no way to know, but as we view it, the Constitution does require that the petitioner have the same kind of trial that the plaintiff has. This as we view it was not accorded to her although error is admitted it is claimed to be harmless. We call to the Court's attention one other case under harmless error, which is an Oklahoma case. The Criminal Court of Appeals of the State of Oklahoma in construing the harmless error doctrine of Oklahoma in the case of *Kizer* v. *State*, Okla. Cr. App., 78 P.2d 831, 835, used the following language:

> "Where the record reveals that a defendant has been deprived of a substantial right, the error is not 'harmless,' within operation of statute providing that no judgment shall be set aside or new trial granted on ground of misdirection of jury, improper admission or rejection of evidence, or any error in pleading or procedure unless it appears that error probably resulted in miscarriage of justice or constitutes substantial violation of constitutional or statutory right. 22 Okl. St. Ann. Sec. 1068, St. 1931, Sec. 3206."

Whether a substantial right is invaded by the admission of irrelevant and incompetent evidence depends on the circumstances of each case. In *University City, Mo.* v.

Home Fire & Marine Ins. Co. (C.C.A. 8th, 1940), 114 F.2d 288, 295, 3 FR Serv. 61.411, Case 1, a city brought an action on fire policies against the insurers who contended that the fire did not occur in the building described in the policies. The trial court allowed the admission of exhibits consisting of expired policies issued by other companies and correspondence concerning such policies in order to assist it in construing the policies in suit. There was no evidence that the insurers in issuing the policies relied upon the information contained in the exhibits, and the exhibits were given an undue emphasis before the jury. The Circuit Court of Appeals for the Eighth Circuit, reversing for the admission of prejudicial evidence, said:

> "* * * Neither this statute (28 U.S.C. Sec. 391 [1940]) nor Rule 61 * * * were intended to deprive a litigant of a substantial right in the trial of a case, civil or criminal. Whether or not a substantial right is invaded by the admission of irrelevant and incompetent evidence must depend upon the circumstances of each case. In this instance it so happened that the incompetent evidence was given great prominence upon the trial. It was given an emphasis before the jury altogether out of proportion to its merits. It was excluded when it was first offered and nearly two days later the case was reopened and its admission reconsidered. As the trial worked out the evidence was highly prejudicial."

The case of *Dow v. Carnegie-Illinois Steel Corp.* (C.C.A.3rd, 1948), 165 F.2d 777, was reversed for the reason that the trial court admitted evidence elicited from the plaintiff when called as on cross-examination showing that there had been marital difficulties between the plaintiff and the deceased before their reconciliation prior to the de-

ceased's death. This evidence was admitted on the question of damages and as tending to show that the plaintiff would have received little or no benefit from the deceased had he lived. The Circuit Court of Appeals for the Third Circuit concluded that such evidence was inadmissible and that the possibility of substantial prejudice from its admission was enough to invalidate the verdict.

It is the rule also, as we think, that the error in the admission of evidence or any type or kind of error is likely to be less harmful before the court without a jury than in an action with a jury.

In the case of *Downie* v. *Powers* (C.A.10th, 1951), 193 F.2d 760, 766, 767, 16 FRServ. 51.21, Case 1, the Court in discussing the trial court's failure to comply with Rule 51 by informing counsel for the plaintiff as to which requested instruction would be given and which would be denied, Judge Murrah said:

> "No one would say that failure to literally comply with the requirements of the Rule would be reversibly erroneous • • •.
>
> "Here, the trial court refused after repeated requests, to indicate which of the requested instructions would be refused and which would be given, or to indicate generally what his instructions would be. This is not an ordinary case in which the law is settled by adjudicated cases. It involves a conspiracy to violate civil rights in which private persons are alleged coconspirators with public officials. There was a contrariety of views concerning the applicable law of the case, and the questions were not authoritatively settled until after trial. See *Collins* v. *Hardyman*, *supra* (341 US 651, 71 S Ct 937, 95 L ed 1253). The applica-

ble law of the case undoubtedly entered into and affected the course of the argument to the jury. Counsel did not know what those instructions would be until after his argument, and we think in these circumstances, the failure of the court to observe either the letter or the spirit of the rule was prejudicial error."

Therefore, we say as to whether any given state of facts constitute harmless error or do not constitute harmless error must be determined by whether or not it affected a substantial right of the party complaining, whether it be in the admission of evidence, the rejection of evidence, the giving of instructions or any other part of the proceedings of a trial, and these must be determined in each case by the facts and circumstances in each particular case. We think there is grave danger in applying too freely two terms. One is the phrase "harmless error" and the other is "sound discretion of the trial court." The opinion in this case of the Circuit Court we think lends too much credence to what it considers discretion of the trial court. We don't think discretion can be substituted for law. That is a fixed rule of law.

If this Court should have detailed to it a case wherein the argument was conducted and permitted as it was in this case, the first question this Court would ask would be: Why was there any reason to do this? The answer would have to be: None, except the plaintiff in the trial court wanted at least a reasonable advantage. There has to be a purpose in all things and we do not criticize the attorneys for the plaintiffs in the trial court, respondents here, for taking advantage if they can do so, but we do not believe it is right to permit this practice in any court, much less a

United States Court. We know it is not fair, we know it is in violation of the rules of law, and if before the Supreme Court of the United States some lawyer should rise who had the burden of presenting the matter and say to the Supreme Court of the United States: "I will only argue the matter four or five minutes and will not cover the whole case, and then after the other side responds I will take 25 minutes and close", this Court would not tolerate it one second. The Circuit Court of Appeals, Tenth Circuit has a rule requiring the one having the burden to make a full and complete argument. The Law of Oklahoma requires it as we have cited, and now the opinion of the Circuit Court disposes of that matter simply by saying it was in the "discretion of the trial court." Nothing is in the discretion of the trial court which will take away a substantial right of a party as we view the law. The court by discretion cannot make law or change law as was done in this case. The Oklahoma Supreme Court has defined discretion of the trial court in the case of *Burke v. McKenzie et al.*, 313 P.2d 1090, decided June 25, 1957, reversed the trial court for an abuse of discretion, and in discussing the question of judicial discretion used the following language:

> "A trial court's discretion to do, or to refuse to do something, in certain instances is a legal discretion, to be exercised in accordance with fixed principles of law. The term (judicial discretion) is the subject of many definitions, though generally recognized as being synonymous with judicial power. In *Kidd v. Commonwealth* (Ky.), 74 S.W.2d 944, 'Judicial Discretion' was said to be an impartial discretion, guided and controlled by fixed legal principles, a discretion to be exercised in conformity with the spirit of the law (an equitable decision as to what is proper and just

under the law) and in a manner to subserve and not defeat the substantial ends of justice.

"And in *Pickett* v. *C., R. I. & P. Ry. Co.*, 169 Okla. 123, 36 P.2d 284, we recognized this principle in the following statement:

" 'There are many definitions of judicial discretion. As said in *Deeds* v. *Deeds*, 108 Kan. 770, 196 P. 1109, 1110: " 'Judicial discretion' implies the liberty to act as a judge should act, applying the rules and analogies of the law to the facts found after weighing and examining the evidence"; and as stated in *Smith* v. *Hill* (C.C.A.) 5 F.2d 188: "Judicial discretion is not the indulgence of a judicial whim, but is the exercise of judicial judgment based on facts and guided by laws"; and in *Conway* v. *Minnesota Mutual Life Insurance Co.* 62 Wash. 49, 112 P. 1106; 40 L.R.A.(N.S.) 148: "The term 'Judicial discretion' may be defined generally as a discretion which is sound and guided by fixed principles of law " '."

For making the comparison, we wish to use in this brief the word "abuse of discretion" and give to the Court a definition thereof, and we think that if there was a discretion it was certainly abused. The term has been defined, that is abuse of discretion, variously as meaning act done or step taken not according to the regular course of proceeding. See *Ramsey* v. *Holland*, 172 N.E. 411, 35 Ohio App. 199, 201, 202. Effecting an injustice, see *Hale* v. *Hale* (Cal. App.), 45 P.2d 246, 247. Clear error of law in the circumstances, see *Grant* v. *Michaels*, 94 Mont. 452, 460, 23 P.2d 266, 270. Manifest error, see *State* v. *Robinson*, 111 S.C. 467, 468, 98 S.E. 329, and also *B. F. Avery & Sons* v. *Bennett*, 104 S.C. 419, 420, 89 S.E. 466. Unreasonable departure from considered precedents, and settled judicial custom, see *In re Horowitz*, 250 Fed. 106, 107. Use of discretion contrary to

established usage, see *Miller* v. *Lash*, 4 Pa. Super. 292, 299, and 1 C.J., p. 373, note 19.

When the trial court permitted counsel to argue this case in the manner in which they argued it, that action of the trial court was not guided by fixed principles of law, but on the contrary, was contrary to fixed principles of law, and the court had no right under the guise of judicial discretion to deny to this petitioner the right to have her counsel argue this case after opposing counsel who represented the plaintiff in the trial court had made a full and complete argument. This was a right she had under fixed principles of law and it could not, as we view it, be taken from her under the guise or statement of judicial discretion. The same is true as we view it with reference to plaintiff J. D. Shelton crying and weeping on the witness stand when his own lawyer asked him a simple question of looking at a picture of an automobile and his wife Venera Shelton crying in the presence of the jury at the same time. This is a terrible atmosphere to be forced to try a case in. It certainly turns a courtroom into a crying match and the administration of justice into a sympathy contest rather than trying a case under fixed principles of law and fixed principles of conduct. To brush it off on the ground of "judicial discretion" is too much we think, and is too harmful to our conception in America of justice, trials and courts.

CONCLUSION

We feel the record completely and fully substantiates every question presented herein.

We feel that to begin with, the court did not instruct the jury correctly or fully. We feel that the court did not

have the right to refuse the requested instructions which fully presented the petitioner's theory of her defense in the trial court. We feel that the trial was not conducted in accordance with the legal standards and the usual and ordinary way trials are conducted. This is probably, we think, one of the most unusual cases that will be filed in this Court as it presents unusual questions. Seldom will this Court have a case where not one plaintiff but two plaintiffs are crying at the same time in the presence of the jury and the lawyer for the defendant begging for a mistrial. Seldom will this Court have a case where 24 requested instructions are presented by the defendant and possibly one actually given. Seldom will this Court have a case where the trial judge will tell the jury that the plaintiff has a right to assume that all persons using the highway will use the same in a reasonable and careful manner and when a defendant requests an instruction presenting the same question on her behalf, the same is refused. Seldom will this Court have a case where the defendant requests the court to instruct the jury as to what a legal term means, as in this case "assured clear distance ahead", and the court refused to even tell the jury what that term means and leaves it up to the 12 jurors, men and women, to give and fix any standard they desire to fix as to what assured clear distance ahead means, and we say most sincerely that if a trial court can do this, then the trial court can refuse to define negligence, the trial court can refuse to define proximate cause, the court can refuse to define any term defined in the law books and leave it up to the jury to define these terms any way they see fit and thus actually destroy the administration of justice.

We think in this case this Court should exercise its supervisory control and issue a Writ of Certiorari, examine this case carefully and hear it fully and reverse this cause for a new trial in order that substantial justice may be done and in order that there may be no question as to the proper procedure in trials of this kind.

May we reiterate for emphasis sake only, that we have the highest regard for the trial court, the Circuit Court of Appeals and this Court, and nothing we have said in this brief is intended as a reflection on any of the courts, but we do hope the Court will consider the sincerity of counsel and petitioner in that there is only left to this petitioner her plea and appeal herein for relief from which we feel is absolutely an erroneous and illegal judgment.

We therefore request the Court to take jurisdiction, grant certiorari and grant relief herein.

Most respectfully submitted,

JOHN B. OGDEN,
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Attorneys for Petitioner.

By John B. Ogden
JOHN B. OGDEN

January, 1958.

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of this Petition for a Writ of Certiorari to Howard S. Smith, Pulley Building, Sulphur Srpings, Texas, and to R. M. Mountcastle, Barnes Building, Muskogee, Oklahoma, attorneys for respondents, on this the 23rd day of January, 1958, by depositing the same in the United States Mail with sufficient postage affixed thereon.

John B. Ogden

JOHN B. OGDEN

CERTIFICATE

I, John B. Ogden, one of the attorneys for the petitioner, certify that the Petition for a Writ of Certiorari is filed and presented in good faith and not for the purpose of delay, but in order that substantial justice may be done.

Dated this the 23rd day of January, 1958.

John B. Ogden

JOHN B. OGDEN

APPENDIX

APPENDIX "A"

"FILED

"United States Court of Appeals
"Tenth Circuit

"Nov 7 1957

"Robert B. Cartwright
Clerk

"UNITED STATES COURT OF APPEALS
"TENTH CIRCUIT

"September Term, 1957

"MINNIE FRANKLIN, Appellant,	)	
vs.	)	Number 5579
"J. D. SHELTON and wife, VENZRA SHELTON, suing herein in their own behalf; and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend, Appellees	)	

"APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

"John B. Ogden and Josh Lee (R. H. Howard was with them on the brief) for Appellant;

"R. M. Mountcastle and Howard S. Smith for Appellees.

"Before BRATTON, Chief Judge, and HUXMAN and BREITENSTEIN, United States Circuit Judges.

"HUXMAN, Circuit Judge.

"This is an appeal from a judgment based on a verdict awarding substantial damages to the plaintiffs, J. D. and Venera Shelton, and to their minor children, Pamela, Larry, Anita and Robert Shelton, through their next friend, J. D. Shelton, for injuries suffered by them as the result of an automobile accident on Highway 77 south of Ardmore, Oklahoma.

"At the time of the accident, the Shelton car was going north and the Franklin car was going south. In order to reach a business establishment located east of the highway, the Franklin car turned left at a place other than a road intersection, crossing the east side of the highway in the path of the Shelton car. The Shelton car crashed into the side of the Franklin car resulting in personal injuries to all parties and inflicting damages to both vehicles. Suit was brought by the plaintiffs for personal and property damages alleging the negligence of defendant as the sole proximate cause of the accident. The defendant answered denying the allegations of negligence and filed a cross-complaint seeking personal and property damages resulting from the alleged negligence of plaintiffs, J. D. and Venera Shelton.

"Trial was had to a jury which found that the negligence of defendant was the sole proximate cause of the accident and assessed damages thus: J. D. Shelton, $53,181.00; Venera Shelton, $6,125.00; Larry Shelton, $20,375.00; Robert Shelton, $2,750.00; Pamela Shelton, $400.00; and Anita Shelton, $400.00. Judgment was entered upon the verdict and defendant appealed.

"Error is predicated upon the action of the Court in denying a motion to strike parties plaintiff because of misjoinder, that the questions of law and fact were not common to all of the plaintiffs; and that it was prejudicial to the rights of the defendant to permit all of the parties to proceed in the same action. The essence of the motion was that the defense of contributory negligence applied as to the driver, J. D. Shelton, and his wife, Venera Shelton, but did not apply as to the minor children. Rule 20(a), Federal Rules of Civil Procedure, in part provides, 'All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.' Clearly the question of negligence on the part of the defendant in the operation of her automobile as the proximate cause of the accident and the resulting injuries to all of the plaintiffs was a question of fact common to all of the plaintiffs. Therefore, they were authorized by the rule to join in a single action for the recovery of damages. Trial courts have a wide discretion as to joinder of parties and to consolidation of cases for trial.[1] The trial Court did not abuse its discretion in conducting a single trial for the adjudication of the rights of all of the parties.

"In a motion for a more definite statement, the defendant sought to require the plaintiffs to further itemize their medical expenses. Rule 12(e), Federal Rules of Civil Procedure, provides, 'If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be re-

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[1] *Gillette Motor Transport, Inc.* v. *Northern Oklahoma Butane Co.* (10th Cir.) 179 F 2d 711.
Rankin v. *Shayne Bros., Inc.* (DC 1956) 234 F 2d 35.

quired to frame a responsive pleading, he may move for a more definite statement * * *.' Without elaborating, it can be stated that plaintiffs' complaint alleged negligence and the damages sustained by the alleged negligence sufficiently to allow defendant to file a responsive answer. Under such circumstances, any further particulars which defendant might have needed in order to prepare for trial should have been obtained by the discovery procedures. It was not an abuse of discretion to deny defendant's motion.

"Complaint is made that the Court erroneously struck from defendant's answer the allegations contained therein with reference to the joint ownership of the automobile in which plaintiffs were riding. The pleadings indicated that plaintiffs were residents of Texas and the contention is that under the community property laws of Texas it is presumed that J. D. and Venera Shelton were joint owners of the automobile in which they were riding at the time of the accident, that the money used by them on the trip was community money jointly acquired and that the trip was a joint mission of pleasure for themselves and their family. The intended purpose of the allegation was to invoke the law of Texas as the basis for imputing to plaintiff, Venera Shelton, negligence on the part of her husband in the operation of plaintiffs' automobile. But since the accident and the resulting injuries occurred in Oklahoma, the question of imputed negligence was to be determined by the law of that state. Under the law of Oklahoma, the fact that plaintiffs, J. D. Shelton and Venera Shelton, were husband and wife and the fact that they were on a mission for the mutual benefit of both is not sufficient by itself to impute to her negligence on the part of her husband in

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[2] *W. W. Clyde and Company* v. *Dyess* (10th Cir. 1942) 126 F.2d 719

the operation of the motor vehicle in which she was riding and he was driving.[3]

"So also must fall appellant's argument that Venera Shelton was negligent, as the co-owner of the automobile, in failing to exercise her duty to prevent her husband from operating the auto in a dangerous, reckless manner in violation of the law.[4] There was no showing that J. D. Shelton engaged in illegal or reckless acts which would call forth the duty on the part of Venera Shelton to control her husband's driving. In any event the matter was put to rest by the jury's finding that the sole proximate cause of the accident was defendant's negligence.

"It is further contended that the Court erred in striking from defendant's answer the allegations therein with respect to the common custom and usage of the highway at the point where the accident occurred, and rejecting evidence relating to that matter. In her answer defendant pleaded at length that there was a business and residential section along the highway in the vicinity of the point at which the accident occurred; that it had become the common practice, usage and custom to use the area as a business section and that automobiles were continuously driven across the highway in the area. It is the law in Oklahoma that the statutes of the State relating to the use of public highways are controlling over customs and usages which are repugnant to the statutory regulations.[5]

"The instructions of the trial Court adequately advised the jury as to the applicable Oklahoma statutes, irregardless of what custom and usage existed. The statutes of Oklahoma as regards the operation of a

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[3] *Hasty* v. *Pittsburg County Railway Co.* (Okla.) 240 Pac. 1056.
[4] See *Fixico* v. *Ellis* (Okla.) 46 P.2d 519.
[5] *Smith* v. *Cox* (Okla.) 361 P.2d 649.

motor vehicle as given by the Court in its instructions would be determinative of the standard of duty imposed upon the defendant. The instructions also covered the duty of plaintiff to operate his vehicle in accordance with the existing conditions of the highway at the point of the accident and the immediate surroundings. The Court did not err in this respect.

"Appellants contend that the trial Court erred in admitting certain testimony of Venera Shelton as related to physical injuries and suffering of herself and others of the Shelton family. It is argued that Mrs. Shelton was allowed to give medical testimony which should have come from a medical expert. In part she testified that her husband was a barber; that some time prior to the accident he had a tooth extracted from which some difficulty stemmed requiring a doctor's attention, and that he had been able to resume work after the difficulty cleared up. She also testified that her husband had done little work since the accident. She further testified as to the scars, bumps and obvious physical impairments suffered by her children from the accident; that her two daughters and youngest son had been nervous and that her oldest son had been slow in school and unobservant since that time; that Anita Shelton had had two upper front teeth knocked out and her nose crushed in the accident and that as a result of her crushed nose she now had difficulty breathing; that when first placed in a car after the accident she screamed and did not want the family to drive, and that at night she had nightmares and screamed; that Robert Shelton, among other injuries, had two ribs broken and a punctured lung, that tubes were placed to make the lungs expand, and that he had a scar on his back where the tubes were placed. Concerning herself, Mrs. Shelton testified that at the time of the accident she was knocked unconscious; that she had suffered certain obvious physical injuries

which were still painful and bothersome; that the sight in her left eye was destroyed; that before the accident her eyes focused properly, and that since the accident her left eye had started crossing and losing its power to focus; that prior to the accident her menstrual periods were normal and that since the accident her menstrual periods had been irregular and abnormal and that presently she was going through the menopause.

"It is uniformly held that where injuries complained of are of such character as to require skilled and professional persons to determine the cause and extent thereof, they must be proved by the testimony of medical experts, but, that a lay witness is competent to testify concerning those physical injuries and conditions which are susceptible to observation by an ordinary person.[6] On examination of all of Venera Shelton's testimony, it appears that in only one instance did she testify to injuries, conditions and events which a lay person would not be capable of observing, or to facts not within her own knowledge. In that instance she testified that her youngest son had suffered two broken ribs and a punctured lung. To this she was not competent to testify, but testimony to this effect had already been given by a medical witness. Her testimony was merely cumulative and constituted harmless error.[7]

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[6] *United States* v. *Monger* (10 Cir.) 70 F.2d 361, 363;
Niagara Fire Ins. Co. v. *Muhle* (8 Cir.) 208 F.2d 191, 196;
Chicago and N. W. Ry. Co. v. *Green* (8 Cir.) 164 F.2d 55, 63;
Prudential Life Ins. Co. v. *Bialkowski* (4 Cir.) 85 F.2d 880, 882;
Corrigan v. *United States* (9 Cir.) 82 F.2d 306, 309;
United States v. *Woltman* (DC Cir.) 57 F.2d 418;
32 C.J.S., Evidence, § 467, pg. 107;
20 Am. Jur., Evidence, § 858, pg. 719.

[7] *St. Louis & San Francisco Railroad Co.* v. *Bateman* (Okla.) 240 Pac. 110

"It is also contended that the evidence given at the trial was insufficient to support a verdict for Vera Shelton. It is argued that there was a complete lack of medical evidence concerning the injuries sustained by Mrs. Shelton and that there was no competent evidence showing her injuries to be the proximate result of the accident. The Oklahoma Court in an unbroken line of decisions has held that where the injuries complained of are of such a nature as to require skilled and professional men to determine the cause and extent thereof that it must be established by such competent testimony that the injuries were the direct and proximate result of the defendant's negligence in order to warrant recovery.[8]

"In part Mrs. Shelton testified that since the accident one eye was crossing and losing its power to focus, and that she had been having certain female disorders. While she was competent to testify that she was suffering from these disorders, her testimony was not competent to establish that these subjective conditions were the proximate result of the accident. The conditions complained of were of a nature requiring competent medical testimony to establish their cause and their cause could not by laymen be definitely attributed to the accident, absent expert medical testimony to that effect. The trial Court erred in allowing the jury to consider the question of these injuries in arriving at its award of damages.

"It is contended that the Court erred in its instructions to the jury. Five exceptions were taken to the instructions. To one instruction the exception was

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[8] *Cushing Coca-Cola Bottling Co.* v. *Francis* (Okla.) 245 P.2d 84;
Spivey v. *Atteberry* (Okla.) 238 P.2d 8.4;
James I. Barnes Const. Co. v. *Hargrove* (Okla.) 29 P.2d 573;
Inter Ocean Oil Co. v. *Marshall* (Okla.) 26 P.2d 399;
Willet v. *Johnson* (Okla.) 76 Pac. 174.

'* * * we think it is not proper under the circumstances because we think that the testimony of the defendant shows she stopped, and didn't have to give a signal for a turn left.' To another instruction '* * * That is the one, Judge, saying that he had a right to assume that everybody, that others on the highway would use the highway lawfully in determining speed and ability to stop within the assured clear distance ahead. I don't know that that is the law, if the Court please, that he had the right to assume that.' And to another, 'It's about an emergency situation. I think that that instruction standing alone would not be proper, but if the Court would put in there that if he did anything to bring about his condition of peril, why then he couldn't, you know, he wouldn't be bound.' The fourth and fifth exceptions were, '* * * I would like to except to 8-A' and '* * * then 9 is on the same situation, Judge. I think I must protect myself on my theory about it, you know.'

"Rule 51 of the Federal Rules of Civil Procedure provides in part, 'No party may assign as error the giving or the failure to give an instruction unless he objects thereto * * * stating distinctly the matter to which he objects and the grounds to his objection.' In none of defendant's exceptions to the instructions were the matters objected to or the grounds for the objection stated sufficiently distinct to afford the trial Court an opportunity to correct errors in its instructions if such existed. The exceptions taken did not meet the requirements of the Rule of Civil Procedure and, therefore, the correctness of the instructions will not be reviewed on appeal.[2]

"Defendant filed twenty-four requests for instruc-

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[2] *Hayes* v. *United States* (10 Cir. 1956) 238 F.2d 318, and cases cited therein.

tions. The failure to give some of these instructions, especially those dealing with defendant's right to the use of the road as a reasonable and prudent person, is assigned as error. Nowhere in the record does it appear that defendant objected to the Court's failure to give its requested instructions. In the absence of such timely objection the question of the Court's refusal to give defendant's instructions will not be reviewed on appeal.[10] The instructions given by the trial Court clearly, fairly and adequately presented to the jury every essential element necessary to arrive at a just and proper verdict under the law. Its refusal to give a requested instruction is no error if the matter has been adequately and correctly covered in the instruction given.[11]

"Appellant contends that the Court erred in refusing to declare a mistrial on account of the weeping of J. D. and Venera Shelton in the presence of the jury while J. D. Shelton was being examined as a witness. At the time, J. D. Shelton was testifying to the condition in which he found his children shortly after the accident. Appellant argues that the weeping was prejudicial to defendant's position and prevented a fair trial. The matter of declaring a mistrial is one resting largely in the discretion of the trial court, and the conduct of a party in weeping or crying in the courtroom does not necessarily justify a new trial, where it does not clearly appear that such conduct improperly influenced the jury.[12] Nothing in the record indicates that the trial Judge abused his discretion in not ordering a mistrial. It must be presumed that he was in the best position

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[10] Rule 51, Federal Rules of Civil Procedure.

[11] *Thringer* v. *Barlowe* (10 Cir.) 205 F.2d 476.

[12] *Tom Reed Gold Mines Co.* v. *Joe Bord* (Ariz.) 260 Pac 191, 57 A.L.R. 55;
Aderhold v. *Stewart* (Okla.) 46 P.2d 340

to discover whether plaintiffs' conduct had such an effect upon the jury that the trial could not continue on a fair basis.

"Appellant contends that the trial Court erred in allowing attorneys for the plaintiffs to divide their time for final argument. Five minutes were used in the opening argument, limiting its scope to questions of negligence, and twenty-five minutes were used in the closing argument, limiting its scope to damages. Matters relating to final argument are largely within the discretion of the trial court.[13] Nowhere is it indicated what elements in plaintiffs' closing argument prejudiced defendant's position, or toward what new matter, if any, they did not have the opportunity to reply. The arguments of counsel are not before this Court and it is impossible to discern whether defendant was prejudiced by plaintiffs' attorneys splitting their argument, as was done. The record is silent as to any request by defendant for additional time to answer the closing argument. In the absence of some indication of prejudice to defendant's position, it must be assumed that the trial Court acted within its discretion.

"Appellant contends that the trial Court erred in not declaring a mistrial after the jury had been in session for four hours and then stated in open court that they had not arrived at a verdict on any of the points or claims of the case. It is also argued that the Court erred in allowing the jury to separate for the night and return the following day to continue their deliberations. The record indicates that the jury received the charge and retired for its deliberations at three o'clock in the afternoon. At 7:05 p.m. that evening the jury returned to the courtroom at their own request, stating

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[13] *Purington Paving Brick Co.* v. *Metropolitan Paving Co.* (8th Cir.) 4 F.2d 676, 682.

they had not reached a verdict at that time. They were then released for the night and reconvened the following day at 10:00 a.m., bringing in their verdict shortly after noon. On these facts the defendant argues that the Court abused its discretion in not declaring a mistrial. The record does not disclose any objection to the separation of the jury or to the resumption of deliberations on the following morning. Neither does the record show facts indicating an abuse of discretion by the trial Court in allowing the jury to separate and continue its deliberations the following morning. The Court acted within its discretion in refusing to declare a mistrial.

"Finally, it is argued that the verdict for plaintiff is excessive and was based upon passion, prejudice and sympathy and that the trial Court erred in refusing to set the verdict aside on defendant's moton for a new trial. This Court in *E. L. Farmer & Company* v. *Hood*, 239 F.2d 547, *certiorari denied* 353 U.S. 911, stated:

> 'It is argued that the verdict is excessive and obviously the result of passion and prejudice. The question whether a verdict is excessive and is the result of passion and prejudice is one for the trial court to determine on motion for new trial. The action of the court in granting or denying a motion for new trial on that ground is not open to review on appeal except for abuse of discretion. And ordinarily it will not be held on appeal that the trial court abused its discretion in denying a motion for a new trial on such ground unless it affirmatively appears that in respect to amount the verdict resulted from bias, prejudice, or passion.'[14]

There is nothing in the record indicating that the verdict resulted from bias, prejudice or passion. Neither

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[14] See also *Chicago, Rock Island & Pacific Railway Co.* v. *Kifer*, (10th Cir.) 216 F.2d 753."

can it be said that the verdict was excessive considering the evidence of damages shown during the trial. The Court did not abuse its discretion in denying defendant's motion for a new trial.

"The judgment for Venera Shelton is REVERSED and as to her the case is remanded for a new trial; in all other respects the judgment of the trial Court is AFFIRMED. Costs are assessed one-half to appellant and one-half to appellees.

APPENDIX "B"

"CHARGE TO THE JURY

"The Court: As mentioned earlier, the plaintiffs bring this action to recover for injuries and damages suffered from a collision between plaintiffs' station wagon and a car being driven by the defendant. The accident occurred just south of the city limits of Ardmore, Oklahoma, on Highway No. 77. Plaintiff J. D. Shelton, husband of plaintiff Venera Shelton, and father of Larry, Robert, Pamela and Anita, minors, was driving the station wagon at the time of the accident.

"Plaintiffs urge that the instant collision was caused by the defendant's negligence in suddenly cutting across in front of plaintiffs' vehicle granting plaintiff, Mr. Shelton, no opportunity to avoid an impact. Plaintiffs specifically assert that the defendant, Mrs. Franklin, was negligent in failing to keep a proper lookout, in operating her car at a dangerous rate of speed considering the existing circumstances, and in failing to yield the right-of-way to plaintiffs' car.

"The defendant denies that she was in any way guilty of carelessness and asserts that the driver of plaintiffs' station-wagon was negligent in driving at an excessive speed; in failing to keep a proper lookout; in failing to keep his car under control so as to be able to 'stop within the assured clear distance ahead'; in failing to yield the right-of-way to the defendant; in failing to have the brakes of his vehicle in proper working order; and, in failing generally to exercise ordinary care.

"In addition, the defendant urges that plaintiffs Mr. and Mrs. Shelton were on a joint journey so as to make the negligence of Mr. Shelton imputable to Mrs. Shelton. And, further asserts that Mrs. Shelton was her-

self guilty of carelessness in not taking that care for herself a reasonably prudent passenger would have; and, specifically alleges, that Mrs. Shelton should have warned Mr. Shelton of the approaching danger and admonished him not to drive in a negligent manner.

"By way of counter-claim the defendant asks to recover for personal injuries she received from this accident.

"It is my duty, as judge, to instruct you on the law; it is then your duty as jurors, to apply the law to the facts which you find exist from the evidence introduced.

"The allegations of the parties are not evidence, in any respect; they merely define the issues to be tried and do not raise the slightest presumption as to the true facts in the case. The introduced evidence must be your sole guide in arriving at the actual facts in this case.

"Each party to this action has the burden of proving his or her affirmative allegations by a fair preponderance of the evidence. A 'fair preponderance' of the evidence is that proof which satisfies your minds as to its truth when weighed against the opposing evidence; it does not mean, necessarily, the greater number of witnesses.

"Thus, for the plaintiffs to recover from the defendant they must establish by this just mentioned measure of proof, that the defendant was negligent, and that her negligence was the 'proximate cause' of the complained of collision.

"And, if the plaintiffs make such proof, in order to then prevent Mr. or Mrs. Shelton from recovering verdicts against her, the defendant, Mrs. Franklin, must establish by a fair preponderance of the evidence that Mr. or Mrs. Shelton were guilty of 'contributory negligence.'

"For Mrs. Franklin to recover on her counter-claim, she must establish by a fair preponderance of the evidence that the plaintiff, Mr. Shelton, was guilty of negligence which was the proximate cause of this accident.

"'Proximate cause', as used in these instructions, means the cause which in natural and continuous sequence, without the intervention of any other cause, produced the injury, and without which the result would not have happened. For an action of negligence to be deemed the 'proximate cause' of an injury, the injury sustained must be such as could have reasonably been foreseen by an ordinarily prudent person.

"'Contributory negligence' may be defined as 'an act or omission by the one seeking to recover, amounting to a lack of ordinary care and prudence, which co-operating or concurring with the negligence of the one sued, becomes the proximate cause of the complained of injury.' A proper consideration is whether or not the person and persons seeking to recover damages took the precaution for his or her own safety that an ordinarily prudent person would have under like conditions.

"You are advised that the Oklahoma Law provides in part:

"1. 'Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than, nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing * * *.'

"2. 'No person * * * shall turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course, or move right or left upon a roadway, unless and until such movement can be made

with reasonable safety. No person shall turn any vehicle without giving an appropriate signal in the manner hereinafter provided. (1) A signal of intention to turn right or left, slow or stop, when required, shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning, or stopping. For turning left the hand and arm are to be extended horizontally.'

"3. 'No person shall start a vehicle which is stopped, standing, or parked, unless and until such movement can be made with reasonable safety.'

"4. 'All vehicle operators must keep a proper lookout and at all times exercise that degree of care that a reasonably prudent person would under similar conditions.'

"Therefore, if you find by a fair preponderance of the evidence that the defendant (1) was not driving 'at a careful and prudent speed' in view of the existing conditions; or, (2) turned her vehicle from a direct course when such movement could not be made with reasonable safety, or, turned left without giving the required signal 'not less than the last one hundred feet traveled by the vehicle before turning, or stopping', or (3) started her vehicle from a standing position when such movement could not be made with reasonable safety; or, (4) failed to keep a proper lookout or otherwise fail to exercise ordinary care under the existing circumstances, any such failure or failures would constitute negligence on her part, and if such negligence was the sole proximate cause of the complained of accident, then your verdict should be in favor of all the plaintiffs.

"You are further instructed that Oklahoma Law requires that '* * * no person shall drive any vehicle upon a highway at a speed greater than will permit

him to bring it to a stop within the assured clear distance ahead;'

"Therefore, should find by a fair preponderance of the evidence that Plaintiff, J. D. Shelton:

"(1) was driving at a speed which was greater than was reasonable and proper under the existing conditions; or, (2) failed to keep a proper lookout; or, (3) failed to keep his car under control so as to be able to 'stop within the assured clear distance ahead'; or, (4) failed in any way to exercise ordinary care and prudence in his driving, any such failure or failures would constitute negligence on the part of Mr. Shelton, and if such negligence was the sole proximate cause of this accident you should find for the defendant, Mrs. Franklin, on her counter-claim.

"However, you are further advised that in connection with Mr. Shelton's duty to drive so as to be able to stop within the assured clear distance ahead, such does not mean that he had an absolute duty to drive in such a manner as to be able to stop and avoid any type of impact under any condition. Whether the plaintiff, Mr. Shelton, was driving so as to be able to stop within the assured clear distance ahead must be determined by you as a matter of fact from all the evidence; and, in this regard you are entitled to consider another applicable law which gives a driver, such as Mr. Shelton, the right to assume that others will use the highways lawfully, in determining his speed and ability to stop within the assured clear distance ahead.

"You are instructed that where the driver of an automobile, without any fault on his part, is placed in a position of imminent peril by another vehicle, the law will not hold him guilty of such negligence as to defeat his recovery for injuries received in an ensuing collision because he does not select the very wisest course, and an honest mistake of judgment in such a

sudden emergency will not of itself constitute contributory negligence, although another course might have been better and safer. The proper test is whether or not such driver exercised that judgment which a reasonably prudent person would have where no time for deliberate judgment existed because of the sudden emergency.

"You are further advised that the mere existence of the marital relation between husband and wife does not impute a husband's negligence, if any, to a wife seeking recovery for her injuries.

"In this connection you are instructed that there is no evidence that Mrs. Shelton shared with Mr. Shelton an equal right to direct and control the movements and conduct of each other, with a voice or right to be heard in the control and management of the automobile, and consequently, the court hereby rules as a matter of law, that the negligence, if any, of Mr. Shelton, is not imputable to Mrs. Shelton, as to her claim.

"As just mentioned it is a general rule that the negligence, if any, of the driver of any automobile is not imputable to the passengers in the car, where such passengers have no right of control over the management and operation of the car; but the question of whether or not such passengers were negligent and whether their negligence contributed to the collision and resulting injuries must be determined by you according to all of the facts and circumstances as disclosed by the evidence. Naturally, the four minor children, plaintiffs in this action, cannot be charged with negligence, under the introduced evidence. However, as to Mrs. Shelton, if you find that from the evidence that she at any time while in a place of safety realized, or by the exercise of ordinary care should have realized, that the automobile in which they were riding was approaching impending danger, or, that the

driver of the station-wagon was not using due caution and care for the safety of himself and his passengers, then it became the duty of Mrs. Shelton to warn her husband of such impending danger or admonish against the careless driving or to exercise such means to avoid injury that an ordinarily prudent person would have under similar circumstances, and her failure so to do would be 'contributory negligence', and she could not recover for her injuries. Naturally, if Mr. Shelton was in no way negligent, Mrs. Shelton could not be guilty of 'contributory negligence.'

"You are further instructed that the law recognizes what is termed as an 'unavoidable accident or casualty', that is an accident which occurs in which no one is guilty of negligence.

"Naturally, if you find that in the instant accident neither the plaintiff, Mr. Shelton, nor the defendant, Mrs. Franklin, were guilty of negligence, but that this accident was 'unavoidable', then none of the suing parties can recover.

"Thus, in resumé, you are instructed:

"1. If the defendant's negligence caused this collision, you should find in favor of all six plaintiffs.

"2. If Mr. Shelton's negligence caused this accident, you should find for the defendant on her counter-claim.

"3. If the negligence of the defendant, Mrs. Franklin, and of the plaintiff, Mr. Shelton, combined to cause this accident, neither Mrs. Franklin nor Mr. Shelton can recover damages. However, the four minor children would be entitled to verdicts against the defendant. And, if Mrs. Shelton were not herself guilty of 'contributory negligence' she would be entitled to recover from the defendant. However, if Mrs. Shelton was guilty of 'contributory negligence' she cannot recover.

"4. If this accident was 'unavoidable', you should find in favor of the defendant on plaintiffs' complaint and, in favor of the plaintiff on defendant's counterclaim.

"Should you find for the plaintiff, J. D. Shelton, you should award him such an amount as will fairly and justly compensate him for the injuries which you find directly and proximately flowed from the negligence of the defendant. This must not exceed $112,190.00, the sum sued for. In determining the amount to be granted Mr. Shelton, if any, you may consider the physical and mental pain and suffering endured up to this time and that which may reasonably be expected in the future—the loss of earning power, both past and future, and medical and hospital expenses both past and that reasonably to be expected in the future, if any.

"Should you find for the plaintiff Venera Shelton, you should grant her that amount which will fairly and justly compensate her for the injuries she received in this accident, not to exceed the sued for sum of $31,429.00. In determining the amount of Mrs. Shelton's award, if any, you may consider the physical and mental pain and suffering endured up to this time and that which may reasonably be expected in the future, loss of earning power, both past and future, if any, and medical and hospital expenses both past and that reasonably to be expected in the future, if any.

"Should you find for the four minor plaintiffs in this action you should award each of them that amount which you deem will fairly and justly compensate each of them for the pecuniary loss each has suffered because of this accident. However, the amounts of these awards must not exceed the sued for sums, which are: (1) For Larry Shelton, $53,500.00; (2) For Robert Shelton, $10,380.00; (3) For Pamela Shelton, $5,000.00; and (4) For Anita Shelton, $5,000.00.

"In determining the amount of these awards you may consider the physical and mental suffering which each has undergone in the past, and reasonably will in the future, because of their injuries; the pecuniary loss each will in all probability suffer after reaching the age of 21 years, if any, because of these injuries; and, the reasonable and necessary costs of hospital services and the services of physicians from and after the date of this accident.

"Should you find for the defendant, Mrs. Franklin, on her counter-claim you should award her such a sum as will fairly and adequately compensate her for the injuries she received because of Mr. Shelton's negligence, if any. However, this award must not exceed the requested sum of $105,973.50.

"In determining the amount of her award, if any, you may consider the mental and physical pain and suffering, past and future, arising from this accident—her loss of earning power, past and future, if any, and medical and hospital expenses, both past and future, arising out of this accident.

"Testimony has been given by men termed by the law—'expert witnesses.' Although the law recognizes and receives the testimony of men whose opinions are based on knowledge gained through study and experience in a specific field, the ultimate weight to be given their testimony is to be determined by you. You are not required to surrender your own judgment to that of any person testifying as an expert witness. However, the testimony of an expert, like any other witness, is to be given such weight as you think proper when you determine the facts in this case.

"You are the sole judges of the facts and of the credibility of the testifying witnesses. In weighing and evaluating the testimony of the witnesses you may consider their demeanor on the witness stand, their in-

terest, if any, in the results of the case, their bias and prejudice or fairness and candor, the probability or improbability of their statements, their character, and all other facts in evidence before you.

"Where possible you should reconcile all the testimony. However, where there is a direct conflict, you should carefully use the standards just mentioned in determining who is stating the truth. The truth is not necessarily with the majority of the witnesses. You may choose to believe one rather than a great number, although the number may be considered along with the other circumstances.

"If you find any witnesses have wilfully testified falsely to a material fact, you may disregard the whole or any part of their testimony which you deem unreliable.

"Your verdict must be based on facts disclosed by the evidence. Certainly, mere speculation or prejudice brought about by sympathy should not enter in.

"Each of you should decide the case yourself, but you should do this only after a careful consideration of the case with your fellow jurors. Although you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors, you should not hesitate to change your opinion when convinced it is in error. An agreement should be reached if you can do so without doing violence to your individual judgment.

"It will take the concurrence of all twelve of you to return a verdict in this case. After you retire, select one of your members as foreman to preside over your deliberations. When your verdict is reached the foreman alone need sign it.

"Ladies and gentlemen, you will notice that five alternative verdicts have been handed you. From these five you will select one to return as your verdict.

"(Both sides waive swearing of the bailiff and the jury withdraws.)

"(Jury recalled immediately upon leaving the court room and the following instructions given:)

"Ladies and gentlemen of the jury, the Court calls attention to the fact that if you find for the plaintiff, Shelton, and the family, the medical expenses amounted to, it has been stipulated, $2,715.00; and if you find for the plaintiff, Shelton, it is stipulated that the damage to his Nash was $600.00.

"Also, the Court calls attention to the fact that in this zone where he was traveling, the speed allowed by law by the State of Oklahoma was 65 miles per hour, but you have to take into consideration the other instructions that the Court has given you with regard to the conditions, circumstances, prevailing at that particular time. It doesn't mean that a man can drive 65 miles per hour in any zone, but that was the speed limit at that time in the daytime, in Oklahoma.

"All right, you may go to your jury room."

APPENDIX "C"

"1. Ladies and gentlemen of the jury you are instructed that the term negligence as used throughout these instructions means the doing of some act which a reasonably prudent person under the same or similar circumstances would not do or the failure to do some act which a reasonably prudent person would do under the same or similar circumstances.

"Given: In substance, W. R. Wallace, District Judge.

"2. You are instructed further that in the operation of an automobile upon the highways of the State of Oklahoma, all persons are required to operate the same in a reasonable and prudent manner having due regard for the traffic upon the highway, the condition of the highway, and that while the speed of an automobile, commonly referred to as a 'speed limit', is fixed by Statute, nevertheless if at a given point or place on the highway on account of the traffic or the use made of the highway such maximum speed would be unreasonable, such person or any person is not authorized to drive at such maximum speed, and you are to determine what would be and what is a reasonable speed considering all of the facts and all of the circumstances at any given point or any given time or any given place, and all persons are required to operate their vehicles under the circumstances at a reasonable speed, and in any event not to exceed the speed fixed by Statute at such point.

"Given: In substance, W. R. Wallace, District Judge.

"3. If a highway at a given point is congested in traffic or used as a business district or used for the purpose of crossing or re-crossing, then the speed should be commensurate therewith, and a car should not be driven at such a speed as would endanger the lives of the occupants of the car or other cars or pe-

destrians using said highway in the manner reasonably anticipated or which should be reasonably anticipated by all of the facts and circumstances surrounding and attending said highway at such place and at such time.

"Refused: W. R. Wallace, District Judge.

"4. You are further instructed ladies and gentlemen of the jury, that no one has exclusive use of the highway. The public highways of this State are for the use and benefit of all those desiring to use said highways and all are required to use them in a reasonable and prudent manner considering all the facts and circumstances shown, and a failure to operate an automobile in a reasonable and prudent manner is negligence under the laws of this State.

"Given: In substance—W. R. Wallace, District Judge.

"5. You are further instructed ladies and gentlemen of the jury, that any person driving an automobile on the highways of this State is required under the law to drive said automobile in such a manner that he or she can stop said automobile within the assured clear distance ahead and you are instructed that it is negligence to operate an automobile in such a manner or at such a speed that the same cannot be stopped by the operator thereof within the assured clear distance ahead, and if you find that the plaintiff herein failed to operate his automobile so that he could stop the same within the assured clear distance ahead and that such negligence upon his part either brought about the accident or contributed thereto, then and in that event the plaintiff cannot recover herein and your verdict must be for the defendant.

"Given: In substance—W. R. Wallace, District Judge.

"6. By the term assured clear distance ahead, you are instructed that this term means that a person must operate an automobile on the public highway so that he can stop his car within the unobstructed range of his vision and if there are obstructions upon the highway he must operate his car so that he can stop the same before coming in contact with such obstruction whether it be an automobile or a pedestrian. Assured clear distance simply means the distance which is assured without any obstruction thereon, and if an obstruction is upon the highway then the driver of an automobile must have his car under such control that he can stop it before colliding with such object.

"Given: In substance—W. R. Wallace, District Judge.

"7. You are further instructed ladies and gentlemen of the jury, that a person driving upon the highway and approaching a hill over which he or she cannot see, must keep such car under control so that he or she can stop the same within the range of his vision and he or she does not have the right to assume that the highway will be clear beyond his or her vision.

"Refused: W. R. Wallace, District Judge.

"8. You are therefore instructed that if you find that in this case the plaintiff was approaching the crest of the hill coming from the south and traveling north and that he could not see over said hill when approaching the same, then he was required to approach the same in such a manner that he could stop his automobile when he arrived at the top of such hill or at a point on said hill where he could see beyond said hill and determine whether or not there was traffic on said highway or approaching said highway and be able to stop the same without injury to any person or persons or vehicles that might be on said highway or crossing the same.

"Refused: W. R. Wallace, District Judge.

"9. Ladies and gentlemen, you are further instructed that it was the duty of the plaintiff in this case to take into consideration in driving his automobile the nature of the surroundings on said highway at the point where the accident complained of occurred. That is, he should take into consideration whether or not there were buildings, whether or not there were businesses operated on said highway and whether or not people would likely be crossing said highway from either the east or the west or turning off of said highway, and he should take into consideration the nature of the highway, whether it was maintained to permit traffic to cross and re-cross, and drive his car taking all of these matters into consideration in a reasonable and prudent manner and anticipate the ordinary and reasonable use of said highway in said regard and whether people would or would not be crossing said highway and whether or not there would likely be traffic thereon considering the use thereof made and the surroundings at such place.

"Refused: W. R. Wallace, District Judge.

"10. You are further instructed that it was the duty of the plaintiff in this case to have his car properly equipped with brakes so that he could stop the same within a reasonable distance considering the size and weight of the car and the condition of the road.

"Refused: W. R. Wallace, District Judge.

"11. You are instructed, ladies and gentlemen of the jury, that the law requiring meeting vehicles to turn to the right does not apply to vehicles crossing from one side of the road to another, and one desiring to stop at premises on the left side of the road may cross over to that side without violating the law. In such cases the driver who desires to cross over must like all other drivers use due care; that is he or she must exercise reasonable care and caution in cross-

ing the highway, but nevertheless, any person has the right to cross any highway provided he or she uses due care in so doing. In determining whether any person is guilty of negligence in crossing a highway or driving a car upon the highway you should use as your guide in determining such matter whether or not an ordinary, reasonable prudent person under the same or similar circumstances would so drive his car across the highway or would drive his or her car in the manner which you find from the evidence either of the parties drove their cars at the time and place in question.

"Given: In substance—W R. Wallace, District Judge.

"12. You are instructed that the duty to drive an automobile on the highways imposed on the plaintiff and defendant mutual and reciprocal obligations and that both were required to operate their cars as a reasonable and prudent person would operate the same under the same or similar circumstances.

"Given: In substance—W. R. Wallace, District Judge.

"13. You are further instructed in this case ladies and gentlemen, that if you find that the plaintiff was guilty of negligence in any manner in the operation of his car and that such negligence contributed to the accident and injuries complained of, then your verdict must be for the defendant although you may find that the defendant was likewise guilty of negligence which contributed to the accident or injuries complained of. In other words, you are instructed that if both parties were guilty of negligence and the combined negligence of both parties brought about the accident, then neither of said parties are entitled to recover from the other and your verdict must simply read: 'We, the jury,

find for the defendant.' which simply means that neither party can recover from the other.

"Given: Covered, W. R. Wallace, District Judge.

"14. You are further instructed ladies and gentlemen of the jury, that in this case if you should find that the accident and injuries complained of were brought about without fault of either party, then the same would be called and termed an unavoidable accident and neither party would be entitled to recover and your verdict must be: 'We, the jury, find for the defendant.'

"Given: W. R. Wallace, District Judge.

"15. Ladies and gentlemen of the jury, you are further instructed in this case that the evidence shows and it is admitted that the plaintiff J. D. Shelton and his wife Venera Shelton owned the automobile in which they were riding jointly and that said plaintiff husband and wife were on a joint mission for their own pleasure and benefit and for that of their family and therefore, the negligence of one was imputable to the other, and both had a duty to either drive said car in a reasonable and prudent manner and keep a proper lookout on the highway for their own safety and the safety of others, and that a failure upon the part of the plaintiff J. D. Shelton to so operate said car in a prudent manner was imputable to his wife Venera Shelton, and that Venera Shelton had a duty to keep a lookout on said highway and to advise her husband of any approaching danger and to warn him of any attending danger on said highway and if she failed to so do, her negligence in this regard is imputable to the plaintiff J. D. Shelton, and if you find that her acts in failing to keep a proper lookout and warn the plaintiff of any approaching danger contributed to or brought about the accident between plaintiffs' car and defendant's car, then and in that event you are in-

structed that your verdict should be for the defendant herein.

"Refused: W. R. Wallace, District Judge.

"16. You are instructed that in the use of a highway in the operating of automobiles thereon, a person may cross the highway or turn to the left across said highway if there is no traffic or automobile in view close enough to constitute an immediate hazard. In other words, a person is not required to wait until the highway is completely cleared in all directions but may cross a highway when there appears to be no car so close as to constitute an immediate hazard, and in this regard you are further instructed that the defendant Mrs. Minnie Franklin had a right to assume that persons driving on said highway would drive their cars at a reasonable rate of speed under the circumstances and would keep their car or his or her car under such control that he or she could stop the same within the assured clear distance ahead.

"Given: Covered—W. R. Wallace, District Judge.

"17. You are further instructed that the defendant Mrs. Minnie Franklin had the right to cross said highway when it appeared to her after looking that there was no vehicle approaching so close as to constitute an immediate hazard, and if she looked and saw no car close enough or in view then she had the right to cross said highway at a reasonable rate of speed.

"Given: Covered—W. R. Wallace, District Judge.

"18. You are further instructed that it was the duty of the plaintiff J. D. Shelton in the operation of the automobile when he observed the automobile of the defendant on the highway to exercise reasonable care and caution to prevent striking her or hitting her car and he should have if he could have reasonably done so under the circumstances, driven his car either to the right or left or stopped said car in order to avoid

said collision, and even if you should find that the defendant Mrs. Minnie Franklin had driven her car out on said highway, nevertheless the plaintiff would not have the right to drive his car into her car regardless of who might have been at fault, but he had a duty to prevent the accident and use reasonable care and caution after he saw her car thereon and to either drive said car to the right or left or apply his brakes with such force as to stop his car if he could have reasonably done so at the time.

"Given: Covered—W. R. Wallace, District Judge.

"19. With reference to the term contributory negligence as used in these instructions, ladies and gentlemen of the jury, you are told that the term contributory negligence simply means negligence on the part of some person or persons which contributes to the accident, and consequently, any person who is guilty of contributory negligence cannot recover.

"Given: W. R. Wallace, District Judge.

"20. Ladies and gentlemen of the jury, you are instructed that evidence has been offered in this case showing or tending to show or for the purpose of showing that on the east side of the highway at or about the point where the collision occurred there were business establishments consisting of cafes, filling stations and other businesses, and that on either side of the paved portion of the highway there was a space leveled and graveled or improved by the Highway Department of the State of Oklahoma for the purpose of affording traffic a place to cross said highway from either the west or the east, and that it was the custom of the public generally to cross said highway from east to west at said point and from west to east, and that it was apparent from one driving on said highway that such use was made of the highway and that such crossing was a common custom or usage, and if you find

from the evidence this to be true, then you are instructed that the defendant in this case, Mrs. Minnie Franklin, had the right to cross said highway provided she used reasonable care and caution in so doing, and that if she exercised the same care and caution in crossing said highway as is or was used by an ordinary, reasonable and prudent person, then you are instructed that after she entered upon said highway and crossing the same if she entered the same before the plaintiffs' automobile had come into plain view, then and in that event she had the right-of-way and it became the duty of the plaintiff to yield the right-of-way to her.

"Refused: W. R. Wallace, District Judge.

"21. Ladies and gentlemen of the jury, in determining whether Mrs. Franklin, the defendant in this case, was guilty of negligence or contributory negligence, you should determine, considering the conditions existing at the point or place of the accident, whether or not she acted as a reasonably careful and prudent person, and if you find that she did so act as a reasonably prudent person under such circumstances in the crossing of the said highway, you are instructed that she would not be guilty of negligence and that she had a right to so act and your verdict must be for the defendant Mrs. Franklin.

"Given: Covered—W. R. Wallace, District Judge.

"22. You are further instructed that under the laws of this State that if a vehicle enters upon the highway an appreciable length of time ahead of another vehicle approaching said point where said vehicle is crossing the highway, said vehicle crossing the highway would have the right-of-way since the first vehicle on said highway would have the right-of-way at said point if it entered upon said highway at said point an appreciable length of time ahead of the other automobile ap-

proaching said point regardless of what direction the other vehicle was approaching from, and you are instructed that both drivers must exercise reasonable precaution commensurate with the apparent dangers incident to driving upon a highway burdened with traffic to avoid injury to the person or property on such highway regardless of which vehicle has the right-of-way.

"Given: Covered—W. R. Wallace, District Judge.

"23. You are further instructed that the right of precedence as to the right-of-way does not release the vehicle thus favored from the duty of exercising due care not to injure another and that it was the duty of both plaintiff and defendant to exercise every reasonable precaution commensurate with the apparent danger incident to driving upon a highway where the accident occurred which was burdened with traffic regardless of which of the vehicles had the right-of-way.

"Given: Covered—W. R. Wallace, District Judge.

"24. You are instructed that it is the duty of a driver of an automobile while driving upon a public highway to keep his automobile always under proper control so as to avoid an accident, and to drive the same at a rate of speed which is proper and sufficiently slow in the light of attending circumstances, and you are, therefore, instructed that if you find from a fair preponderance of the evidence that the plaintiff failed to observe any of the above enumerated duties and obligations of those who drive cars upon the highways, and that this failure so to do was the proximate cause of the accident or contributed thereto, and that the accident proximately produced the injuries, if any, to plaintiff, for which he is now suing, then you are instructed that your verdict should be in favor of the defendant and against the plaintiff.

"Given: Covered—W. R. Wallace, District Judge."